



THE PLACE OF INTERNATIONAL LAW AND RELEVANT BODIES IN ADDRESSING CLIMATE CHANGE DISPLACEMENT – THE MOVE TOWARDS COOPERATION

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I hereby declare that I have read and understood the regulations governing the submission of LLM (Marine and Environmental) dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Date:

‘Nothing great and good can be furthered in the world without
cooperation’ ~ Fridtjof Nansen

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This topic first grabbed my interest in 2008 when I arrived, with little more than a suitcase and the knowledge that I would not receive a salary for the next six months, in Geneva, rumoured to be one of the most expensive cities in the world to live in. Excited about the idea that I might be able to contribute, even just a little, to uncharted waters, I started reading, attended workshops, collected information, and made notes. This paper provided me with a platform to further explore a topic that fascinated me half a decade ago, far away from my home, amongst the international community where I found myself slightly out of my depth.

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AOSIS	Alliance of Small Island States
AR1	First Assessment Report
AWG - LCA	Ad Hoc Working Group on Long –term Cooperative Action
COP	Conference of the Parties
GCF	Green Climate Fund
IASC	United Nations Inter – Agency Standing Committee Working Group on Migration/Displacement and Climate Change
IPCC	Intergovernmental Panel on Climate Change
IOM	International Organization for Migration
LDCs	Least Developed Countries
NAPs	National Adaptation Planning Processes
PSIDS	Pacific Small Island Developing States
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SREX	Special Report on Extreme Events
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1: INTRODUCTION

I. BACKGROUND

Anthropogenic climate change is no longer a debate. The Summary for Policymakers of the Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report states ‘it is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.’¹ Throughout climate change science, literature, negotiations and debates run a golden thread: The effects of climate change will result in grave consequences for humans.² Effects of climate change can range from less water availability, decrease in crop yields, negative impacts on health to rising sea-levels, change in tropical storms and cyclone frequency or intensity, changes in rainfall regimes, increases in temperatures, changes in atmospheric chemistry and the melting of mountain glaciers.³ While the impacts and effects of climate change vary, environmental degradation, sea-level rise, conflict over resources, droughts and floods⁴ may ultimately result in people moving, either temporarily or permanently, within or across borders.

The First Assessment Report (AR1) published in 1990 mentioned human migration as one of the major effects of climate change.⁵ The IPCC noted that shoreline erosion, coastal flooding and agricultural disruption will cause millions of

¹ Intergovernmental Panel on Climate Change (IPCC) Press release dated 27 September 2013 available at: https://www.ipcc.ch/news_and_events/docs/ar5/press_release_ar5_wgi_en.pdf accessed on 13 October 2013 at 1.

² Certain predicted ‘hotspots’ and the implications of climate change in terms of human cost are mentioned in Baker, Jock., Charles, Ehrhart., & Stone, David. ‘Hotspots - predictions and actions’ (2008) *Forced Migration* 31, available at <http://www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf> accessed on 14 March 2013 at 44-45.

³ Foresight, Migration and global environmental change (2011) Final project report, The Government Office for Science, London at 3.

⁴ Kälin, W., Schrepfer N. ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ 2012, available at <http://www.unhcr.org/4f33f1729.html> accessed on 16 August 2013 at 6; Dr Kälin, Walter. (The then Representative of the United Nations Secretary General on the Human Rights of Internally Displaced Persons), ‘Keynote address at the 8th International Association of Refugee Law Judges’ *Climate Change, Migration Patterns and the Law* 28 January 2009.

available at <http://www.iarlj.org/general/images/stories/WorldConferences/8-2009-capetown.pdf> accessed on 1 February 2014 at 2.

⁵ Kälin & Schrepfer op cit n 4 at 11.

people to be uprooted.⁶ It also noted ‘migration and resettlement outside of national boundaries’ might also be necessitated by climate change.⁷ In his capacity as the President of the Global Humanitarian Forum, Kofi Annan issued a report during mid-2009 that also made mention of ‘millions of people’ being uprooted or permanently on the move as a result of climate change, with many millions to follow.⁸

These effects can ultimately cause people to move voluntarily or leave them without any choice, permanently displacing people from their homes. The IPCC states, ‘If disasters occur more frequently and/or with greater magnitude, some local areas will become increasingly marginal as places to live or in which to maintain livelihoods. In such cases, migration and displacement could become permanent and could introduce new pressures in areas of relocation. For locations such as atolls, in some cases it is possible that many residents will have to relocate.’⁹ It is also important to mention from the outset that, for the first time, an entire chapter will be dedicated to climate change and displacement in the forthcoming 5th Assessment Report of the Working Group II of the IPCC.¹⁰ This issue is of vital importance and these are just some of the references made to the so-called ‘climate change displacement’ phenomena.

A dramatic image of islands disappearing as a result of climate change is often portrayed in the media¹¹ and by small island states themselves. The likelihood also exists that mean sea-levels rise will contribute to rising trends in extreme

⁶ See McAdam, J., ‘Climate change displacement and International Law: Complementary protection standards’ 2011, available at <http://www.unhcr.org/4dff16e99.pdf> accessed on 14 June 2013 at 5 fn 8.

⁷ Ibid.

⁸ McAdam 2011 Complementary Protection Standards op cit n 6 at 6.

⁹ Intergovernmental Panel on Climate Change. ‘Summary for Policymakers’ in Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.) *Managing the risks of extreme events and disasters to advance climate change adaptation. A special report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (2012) Cambridge University Press, Cambridge and New York 1-19; also see Kälin & Schrepfer op cit n 4 at 5.

¹⁰ Warner, Koko. ‘Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’ 2011, available at <http://www.unhcr.org/4df9cc309.pdf> accessed on 10 January 2014 at 6: Chapter 13 of the forthcoming 5th Assessment Report of the Working Group II of the IPCC, as well as regional chapter, will make mention of migration and displacement. This thesis was completed prior to the release of this report and its findings could therefore not be incorporated.

¹¹ McAdam, Jane. ‘Disappearing states, statelessness and the boundaries of International Law’ in McAdam, J (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010) 105 – 130 Hart Publishing, Oxford at 107.

coastal high water levels in the future.¹² While the image of the underwater Maldives 2009 cabinet meeting¹³ left a clear picture of the seriousness of climate change, it also illustrates a unique challenge: What will happen if, as a result of the rising sea-levels, certain areas become uninhabitable? What will happen if, in certain extreme cases, states as a whole ‘disappear’, permanently displacing the population to other countries?¹⁴

Perhaps the most threatened by sea-level rise due to their low elevation above sea level are the small island states, Kiribati and Tuvalu,¹⁵ both less than two metres above sea level¹⁶ and facing a real possibility of losing their homes as a result of climate change.

¹² IPCC Summary for policy makers 2012 op cit n 9 at 6.

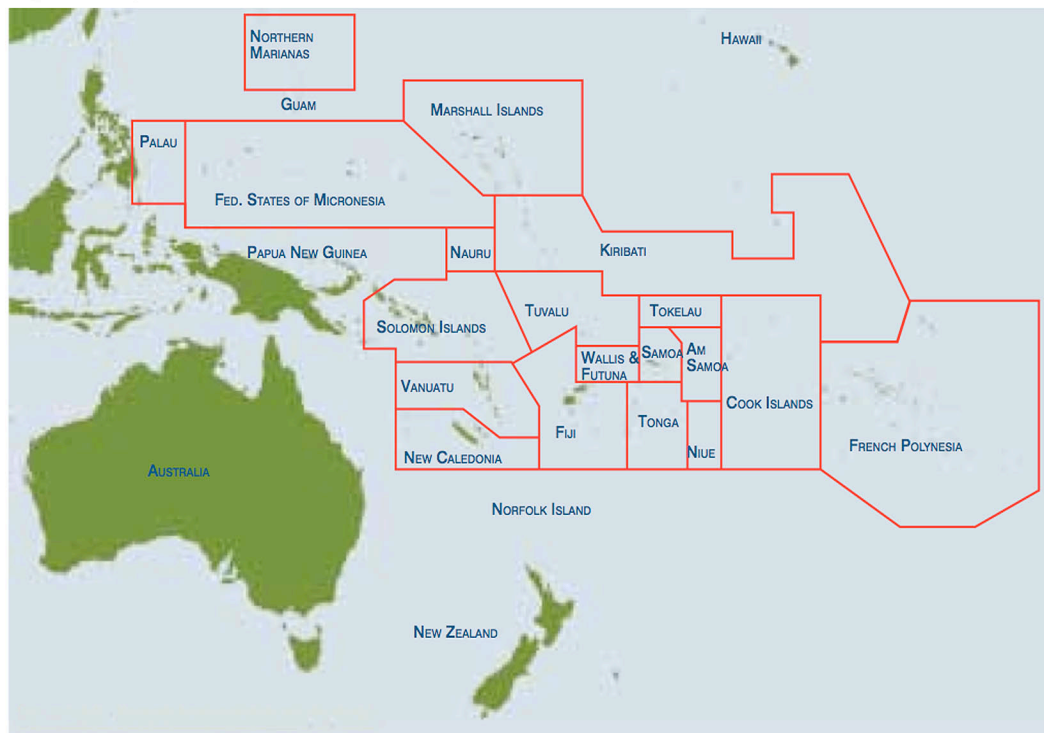
¹³ McAdam 2011 Disappearing States op cit n 11 at 107.

¹⁴ Other instruments also recognize the vulnerability of low-lying and other small island countries – See Human Rights Council Resolution adopted March 2008 available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf accessed on 13 December 2013.

¹⁵ Hodgkinson, D., & Young, L., ‘In the face of looming catastrophe: a convention for climate change displaced persons’ undated, available at <http://www.ccdpconvention.com/documents/Climate%20change%20displacement%20treaty%20proposal.pdf> accessed on June 2012 at 3.

¹⁶ McAdam, J. ‘Swimming against the tide: Why a climate change displacement treaty is not the answer’ (2011) *International Journal of Refugee Law*, 23 (1), 1 - 26 at 6 see fn 30.

Figure 1: Map of the Pacific Ocean



Source: Map of the Pacific Ocean at <http://siteresources.worldbank.org/INTPACIFICISLANDS/Resources/Natural-Hazards-report.pdf>

Less than one per cent of global greenhouse gases are emitted by these small island states. Despite this minimal contribution to climate change, their low adaptive capacity, small physical size of territories, open economies and exposure to climate extremes and natural disasters make them extremely vulnerable and less resilient to climate change.¹⁷

The island nation of Kiribati consists of one island and 32 low-lying atolls, in total Kiribati covers a land area of 811 square kilometres¹⁸ and has a population of over 100 000 people.¹⁹ With one of the highest poverty rates in the Pacific, its people, the I-Kiribati, rely on subsistence activities, mostly fishing and growing of banana and coconut.²⁰

¹⁷ Mimura, N., L. Nurse, R.F. McLean, et al. 'Small islands climate change: impacts, adaptation and vulnerability' in M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 692 - 693 Cambridge University Press, Cambridge at 692 -693.

¹⁸ Forced Migration Report 31 op cit n 2 at 51.

¹⁹ McAdam *Swimming Against the Tide* 2011 op cit n 16 at p6.

²⁰ Forced Migration Report 31 op cit n 2 at 51.

While the soil on the atolls is poor, the fishing grounds are rich. Together with dried coconut, fish represents the majority of production and exports.

The nations' limited income sources and its low-lying landmass, with no higher land, makes Kiribati one of the nations most vulnerable to the impacts of climate change. In this case, the most predominant impact of climate change is sea-level rise.

The President of Kiribati expressly rejected refugee terminology and the use thereof in context of the vulnerability of Kiribati and its nationals.²¹ He saw the use of refugee terminology as 'implying passivity and victimization, instead presenting his population as a potential labour force that could be re-skilled to make a productive economic contribution to countries like Australia.'²²

Apart from the Vatican, Tuvalu²³ is the world's smallest State with a population of just under 12 000 people. This independent nation consists out of four reef islands and five atolls.²⁴ The highest elevation is five metres above sea-level. Other than the Maldives, it is the lowest maximum elevation of any country.²⁵ In 1978 a tidal gauge was installed in Funafiti, the largest island of Tuvalu. A sea-level rise of 1.2 millimetres per year was measured over 23 years, consistent with the estimate of the IPCC global average of 1.2 millimetres per year for the 20th century.²⁶ Coastal erosion is already degrading shorelines, and with saltwater seeping into groundwater, coconut trees are being killed and taro pits are being flooded.²⁷

From 6 to 11 March 2004 the Kiribati Protestant Church hosted the Pacific Churches' Consultation on Climate Change. The Consultation involved 45 to 50

²¹ McAdam, Jane., 'Environmental Migration Governance', 2009, UNSW Law Research Paper No. 2009-1 Available at SSRN: <http://ssrn.com/abstract=1412002> accessed on 7 December 2012 at 7; Also see Chapter 2 for an elaboration on the use of the term "refugee" in this context.

²² Ibid.

²³ A number of documentaries have been made about Tuvalu and its existence that is threatened by sea-level rise. These documentaries are listed in Gemenne, F. (Doctorate in Political Science) *Environmental Change and Migration Flows* (defended April 3rd 2009) *Jointly sponsored thesis directed by Institute d'Etudes Politiques de Paris and University of Liège* at p 174 fn 47.

²⁴ Stallard, Hannah 'Turning up the heat on Tuvalu: An assessment of potential compensation for climate change damage in accordance with state responsibility under International Law' (2009) *Canterbury L.Rev* at 168.

²⁵ Ibid.

²⁶ Ibid.

²⁷ EACH - FOR. 'State of the art review' (2007) *Environmental change and forced migration scenarios* Available at <http://cordis.europa.eu/documents/documentlibrary/126792421EN6.pdf> accessed on 1 September 2012 at 67.

people from Pacific Island countries²⁸ with some participants coming from outside the region.²⁹ Together participants produced a draft statement and recommendations towards the Pacific Churches' climate change commitment. As part of the Otin Taai Declaration³⁰ islanders acknowledged that the impacts of anthropogenic climate change are already visible, and that climate change will have further negative impacts on the inhabitants of Pacific Islands. The negative impacts include:

- loss of coastal land and infrastructure due to erosion, inundation and storm surges;
- increase in frequency and severity of cyclones with risks to human life, health, homes and communities;
- loss of coral reefs with implications for the sea eco-systems on which the livelihood of many Islanders depends;
- changes in rainfall patterns with increased droughts in some areas and more rainfall with flooding in other areas;
- threats to drinking water supplies due to changes in rainfall, sea-level rise and inundation;
- loss of sugarcane, yams, taro and cassava due to extreme temperatures and rainfall changes; and
- human health impacts with an increase in the incidence of dengue fever and diarrhoea.

In addition to sea-level rise, both these island States have various other underlying environmental and socio-economic conditions which increases their vulnerability to climate change.³¹ Also, neither one of these islands has high ground for long-term internal resettlement.³²

²⁸ Kiribati, Nauru, French Polynesia, Niue, Marshall Islands, Solomon Islands, Fiji, Tuvalu, Vanuatu, Tonga, Samoa, American Samoa, New Caledonia, Papua New Guinea, And the Cook Islands.

²⁹ Argentina, Australia Canada Germany, India, Japan, Norway and the USA.

³⁰ Pacific Churches' Consultation on Climate Change – A Statement and Recommendations from the World Council of Churches and WCC Member Churches in the Pacific (adopted 11 March 2004) (Otin Tai Declaration) available at http://www.oikoumene.org/en/resources/documents/wcc-programmes/justice-diakonia-and-responsibility-for-creation/climate-change-water/otin-tai-declaration?set_language=en accessed on 7 January 2014.

³¹ McAdam 2011 Disappearing States op cit n 11 at 125 & 126.

³² Ibid.

(a) Key question

Climate change law is one of the fastest growing new areas of law developing worldwide. In light of the picture painted in Chapter I it is evident that new legal issues are emerging. The topic chosen for this paper is one of many that will have to be addressed as the family of nations seeks ways to address this global phenomenon of climate change and its impacts, already felt across the world.

The central question addressed in this paper is the role of international law in addressing the phenomenon of small island states threatened by sea-level rise, and its people who will be displaced. It also discusses ways and means to determine and facilitate the best policy option to address this particular form of human mobility. Finally, it reviews the international law community's reaction in developing a legal and governance regime in response to 'rising sea levels causing "sinking" small island states'. In so doing, this paper aims to identify particular vulnerabilities, examine existing legal frameworks, discuss proposals and progress made, comment on "gaps" identified and address the options. It also indicates that it is important to look beyond the dramatic depiction of disappearing island nations and to consider instead the detail of the immanent reality. Beyond the images of underwater cabinet meetings lies the uncertainty of the way forward.

(b) Structure of the thesis

Chapter 2 examines the nexus between human movement and climate change. It will be shown that there is no clear-cut causal link between these two phenomena; more specifically it will be shown that there is no 'monocausal relationship between climate change and displacement'.³³ This makes it almost impossible to attribute human movement solely to climate change. It also highlights that it is not correct to assume that environmental degradation necessarily equals migration or displacement.³⁴ It emphasises that human movement as a result of environmental

³³ United Nations High Commission for Refugees (UNHCR) in cooperation with the Norwegian Refugee Council (NRC), the Representative of the Secretary General on the Human Rights of Internally Displaced Persons and the United Nations University. 'Forced Displacement in the Context of Climate Change: Challenges for States under International Law.' (2009) Paper submitted to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June in Bonn
available at <http://unfccc.int/resource/docs/2009/smsn/igo/049.pdf> accessed on 23 March 2013 at 2.

³⁴ Hugo, G. 'Climate change-induced mobility and the existing migration regime in asia and the pacific' in McAdam, J (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010) 9 – 35 Hart Publishing, Oxford at 10.

changes is not a new phenomenon. It also summarises that movement, as a result of the impacts of climate change, will be brought upon by various scenarios. This chapter further notes that it is not only the impacts of climate change that cause movement but vulnerability and the lack of adaptation capacity. In this discussion two observations will be highlighted. It will be shown that there is one environmental impact that can be directly attributed to climate change, namely sea-level rise.³⁵ The second important observation is that there is an ecological region that is particularly vulnerable to this impact: small island states. Before the impact of sea-level rise on small island states is addressed, attention will be given to an estimate of the amount of people displaced as well as the difficulty in defining those displaced as a result of the impacts of climate change. It is seen in this discussion that a suitable definition is yet to be found. It is nevertheless important not to use incorrect definitions, and to stay clear from the term ‘environmental refugees’ since it can undermine the rights of others in needs of protection.

In chapter 3 sea-level rise as a distinct impact of climate change is discussed. Focus is placed on small islands states because of their particular vulnerability to the negative impacts experienced as a result of rising sea-levels. Treating movement that results from the impacts of climate change as a ‘single phenomenon that can be discussed in a general way’ is often one of the biggest drawbacks of scholarship in this field.³⁶ However, this chapter shows that there may well be a time when a group of people from small island states will be forced to leave their land since it will no longer be habitable primarily because of sea-level rise, resulting in a separate group of displaced persons. Chapter 3 concludes by unpacking the notion of islands ‘disappearing’ and the question of loss of territory resulting in ‘statelessness’ is also discussed. Finally, the option of relocation with a focus on the views of the inhabitants of Kiribati and Tuvalu is considered.

Chapter 4 goes on to discuss the role of existing international legal instruments in addressing the question. While people are entitled to move and while most migrate within existing international legal frameworks, this chapter highlights the distinction between those who move voluntarily and those displaced with force. It recognises that most movement that results because of sea-level rise will be

³⁵ Kälin & Schrepfer op cit n 4 at 6 fn 12.

³⁶ McAdam 2011 Disappearing States op cit n 11 at 106; McAdam 2009 op cit 21 at 3.

internal and that the Guiding Principles³⁷ will be applicable. It also looks at the role of the 1951 Refugee Convention³⁸ and suggests that in most cases the Refugee Convention is not applicable. While many had hoped that existing legal frameworks would be able to provide the much-needed answers for those that are forced to cross borders as a result of sea-level rise and who cannot return, it is clear from the discussions in chapter four that this hope is fading and that there is a ‘gap’.

Chapter 5 recognises that the international community is still in the early stages in developing a comprehensive regime to govern this relatively recent global challenge. It further explores the various options that are on the table. This chapter lists some of the proposals made so far while acknowledging that there is a great need to ensure that those forced to leave their ‘sinking’ island states are admitted to other countries on a permanent basis.³⁹ The debate surrounding the need for an international convention is addressed, and it is suggested that climate change as a common driver for movement is not a sound enough rationale to group various displacement scenarios together and to develop policy responses that are generic in nature.⁴⁰ An overarching framework is not without complete purpose and can further identify the range of climate impacts on human movement.⁴¹ It is emphasised that we cannot oversimplify the issue and that a geo-social-political context is important even with displacement as a result of rising sea-levels. The only common feature is the fact that sea-levels are rising, but we still need to examine, respect and apply the differences in ‘nature, timeframe, distance, scale and permanence of potential movements’⁴² in all movement caused by impacts of climate change as well as sea-level rise. A closer look is taken at the United Nations Framework Convention on Climate Change (UNFCCC) Subsidiary Body for Implementation (SBI) Work Program on Loss and Damage and its thematic areas. A strong argument is made that this Work Program provides a framework where

³⁷ Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (adopted 11 February 1998) available at <http://www1.umn.edu/humanrts/instate/GuidingPrinciplesonInternalDisplacement.htm> accessed on 3 March 2013

³⁸ Convention relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (1951 Refugee Convention)

³⁹ Kälén, W. ‘Conceptualising Climate-Induced Displacement’ in McAdam, J (ed) *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) 81 - 104 Hart Publishing, Oxford at 82.

⁴⁰ McAdam 2011 *Disappearing States* op cit n 11 at 105; McAdam 2009 op cit 21 at 3.

⁴¹ McAdam 2009 op cit 21 at 3.

⁴² Ibid.

more specific field work can be undertaken, where more consultations can be facilitated with local stakeholders and vulnerable communities, where information can be gathered and stored at a central portal, and that this will ultimately lead to the development of an unique strategy for each particular vulnerable territory.

Chapter 6 concludes with emphasising that the policy process is still in its infant stage and that it is therefore important not to come to hasty conclusions and misguided policies about the status of those impacted by the effects of climate change.⁴³ It is further concluded that, despite the urgent need to find a suitable policy, a ‘one-size-fits-all’ convention may not be the best suitable solution for those displaced as a result of the impact of climate change and that further work as well as collaboration with the Work Programme on Loss and Damage are essential to ensure that important social considerations and geo-political context are taken into account.

⁴³ McAdam 2011 Disappearing States op cit n 11 at 105.

CHAPTER 2: CLIMATE CHANGE AND DISPLACEMENT

I. HUMAN MOVEMENT AS AN ADAPTATION OPTION TO ENVIRONMENTAL CHANGE

Being one of five key drivers of migration⁴⁴, environmental factors have for decades lead to movement, a natural human adaptation strategy to environmental change and variability.⁴⁵ Human movement or mobility because of environmental changes is thus not a phenomenon new and unique to climate change. All the other drivers of migration – economic, social, political and demographic factors – are also important and often migration is a result of a combination of these drivers. One may be able to argue that a ‘clear link’ exists between human movement and/or displacement and climate change, but it is difficult if not impossible to prove that there is a monocausal relationship between the two.⁴⁶ For this reason, it is unwise to continue along the thought path that describes all future human movement and displacement as the direct result of climate change because it is not climate change per se that uproot people but rather the effects of climate change. These effects are often environmental changes – an old migration driver.⁴⁷

Extreme environmental events such as floods, landslides and wildfires, as well as tsunamis, earthquakes and volcanic eruptions all threaten people’s homes and trigger displacement. Not all these events are impacts of climate change.⁴⁸ Climate change will further exacerbate some of these environmental events and in this manner stimulate the environment as a migration driver even more. For this reason one cannot ignore the fact that the impacts of climate change are affecting at least one of the migration drivers.⁴⁹ Further arguments can also be made that the

⁴⁴ Foresight Report op cit n 3 at 44.

⁴⁵ McAdam 2011 Complementary Protection Standards op cit n 7 at 4.

⁴⁶ UNHCR 19 May 2009 submission op cit n 33 at 4.

⁴⁷ IOM International Organization for Migration. ‘Migration and the environment’ (2007)

Discussion note MC/INF/288 available at

http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf accessed on 11 December 2012.

for the four scenarios that set out the tendency to migrate in relation to environmental change at 2.

⁴⁸ Foresight Report op cit n 3 at 45.

⁴⁹ Morrissey, J., ‘Environmental Change and Forced Migration - A State of the Art Review’ 2009, available at www.rsc.ox.ac.uk/events/environmental-change-and-migration/EnvChangeandFmReviewWS.pdf accessed on 20 December 2013

for a clear outline of the debate between environmental change and migration at 49.

other drivers are negatively impacted by climate change; families, for instance, will suffer economically if crop yields decrease and may move to the city to find work.

(a) Forced movement as a result of environmental change

It is indisputable that environmental changes brought upon by climate change will have an increased impact on migration drivers. It remains uncertain how these changes will manifest and the impact will not be the same everywhere. The 2011 Foresight report⁵⁰ identified three ecological regions that are of particular importance for the interaction between migration drivers and environmental change: low-elevation coastal zones, global drylands and mountain regions.⁵¹ Of particular relevance to this paper are low-elevation coastal zones, home to 10% of the planet's people.⁵² In particular attention will be paid to small island states. Impacts of climate change such as sea-level rise, changes in tropical storm and cyclone intensity as well as changes in ocean chemistry and the degradation of coastal and marine ecosystems will have potentially devastating effects on these regions.

The question arises as to how specifically these regions will be impacted. Rising sea-levels increase the risk of coastal flooding and erosion of ecosystems and coastal land. Rising sea-levels also increase the risk of saltwater infiltration into groundwater, leading to the salinization of freshwater resources, which in turn will lead to decreasing freshwater security and damaging consequences to crops.⁵³ The degradation of coastal and marine ecosystems can negatively impact inter alia livelihoods, and more intense and more frequent tropical storms can destroy people's homes. All of these are by their nature environmental drivers of migration.

⁵⁰ Foresight Report op cit n 3 at foreword, The Foresight report presents the findings of around 350 contributing experts, based in more than 30 countries across the world and representing various disciplines. The key aim of the Foresight Project 'has been to consider how these global drivers could affect the volume and patterns of human migration out to 2030 and thence to 2060; and, importantly, international levels to address the future challenges.'

⁵¹ Foresight Report op cit n 3 at 56.

⁵² Foresight Report op cit n 3 at 39.

⁵³ See United Nations Framework Convention on Climate Change, 'Slow onset events' (2012) Technical Paper FCCC/TP/2012.7 available at <http://unfccc.int/resource/docs/2012/tp/07.pdf> accessed on 3 February 2014 for more information on the impacts of sea-level rise at 8; Foresight Report op cit n 3 at 51.

The principle causes of environmentally induced migration are set out by Stojanov in Table 1.

Table 1: Principle causes of environmentally induced migration

Source: Hugo, G. Original source: R Stojanov, 'Environmental factors of migration' in R Stojanov and J Novasák (eds), *Development, environment and migration: analysis of linkages and consequences* (Olomouc, Palacky university, 2008).

Category	Natural disasters (sudden onset)	Cumulative (slow – onset) changes	Involuntarily caused and industrial accidents	Development projects	Conflicts and workforce
Particular cause	Floods. Earthquakes Volcanic eruptions, Landslides, Coastal storms, Hurricanes, Tsunamis	Land degradation, Droughts, Water deficiency, climate change, Sea-level rise	Nuclear accidents, factory disasters, environment al pollution	Construction of rivers, dams and irrigation canals, mining natural resources, urbanisation	Biological workforce, intentional destruction of environment, conflicts due to natural resources

Climate change is further exacerbating some of the principle causes of environmentally induced migration, found under the Natural disasters and Cumulative (Slow-onset) change columns, and the influence of the environment as a driver of migration will be greater.⁵⁴ For the purpose of this paper, one slow-onset event is of particular importance: sea-level rise.

In the event of the onset of such extreme environmental events migration is one of the response measures, with usually involuntary displacement often being the last option.

⁵⁴ Hugo op cit n 34 at 31.

Dr Walter Kälin, the then Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, identified the following IPCC, Fourth Assessment Report, findings relevant to the displacement issue:⁵⁵

1. 'Climate change is likely to reduce water availability, particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the Southern tips of Africa and Latin America. In contrast, water availability may increase in parts of Eastern Africa, the Indian sub-continent, China, and the Northern Latitudes. Hundreds of millions of people will experience water stress,⁵⁶ whether due to too little or too much water;
2. A decrease in crop yields; is projected which increases the likelihood that additional tens of millions of people will be at risk of hunger. The most affected region is likely to be Africa;
3. Due to rising sea-levels, the densely populated 'mega-deltas' especially in Asia and Africa and small islands are most at risk from floods, storms and coastal flooding and eventual submerging, with a potential impact on tens of millions of people;
4. The overall impact on health will be negative, especially for the poor, elderly, young and other marginalized sectors of society;
5. Overall, the areas that will be affected by climate change are Africa, Asian mega-deltas and small islands.'

⁵⁵ Kälin, W., (Former Representative of the United Nations Secretary General on the Human Rights of Internally Displaced Persons), 'Keynote address at the 8th International Association of Refugee Law Judges' Climate Change, Migration Patterns and the Law 28 January 2009 available at <http://www.iarlj.org/general/images/stories/WorldConferences/8-2009-capetown.pdf> accessed on 1 February 2014 at 51 and 52; also cited in earlier background paper submitted by Kälin (10 October 2008). Displacement Caused by the Effects of Climate Change: Who will be affected and what are the gaps in the normative frameworks for their protection?

⁵⁶ Including droughts and lack of water or flooding, mudslides etc.

Kälin groups the different context and forms together as five typological scenarios that may trigger displacement.⁵⁷

1. the increase of hydro-meteorological disasters⁵⁸
2. environmental degradation and slow onset disasters⁵⁹
3. rising sea levels causing ‘sinking’ Small Island States
4. increase need for governments to designate areas as high risk zones that are too dangerous for human habitation, thus government-initiated planned evacuation of areas at high risk of disasters
5. risk of conflict arising from a decrease in essential resources

It is suggested that the above scenarios can help to⁶⁰

- identify the ‘character of the movement’ (in other words, is the movement forced or voluntary?);
- qualify those who move; and
- assess whether and to what extent present international law can provide adequate normative frameworks to address the protection and assistance needs for such person.

The United Nations Inter – Agency Standing Committee Working Group on Migration/Displacement and Climate Change (IASC) adopted the above framework of the diverse scenarios,⁶¹ while it is widely cited not all scholars accept this categorizing of human movement caused by the impacts of climate change. Some argue that movement patterns depend ‘more on policy responses than on the type of change involved’ and proposed a range of other frameworks.⁶²

⁵⁷ Kälin op cit n 55 at 53; These scenarios were also discussed by Dr Kälin in his speech at the ECOSOC Panel on Disaster Risk Reduction and Preparedness: The Climate Change – Displacement Nexus (16 Jul 2008)

available at http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx

available at <http://www.brookings.edu/research/speeches/2008/07/16-climate-change-kalin> and are often cited in academic literature, see McAdam op cit n 7 at 9; Kälin & Schaper op cit n 4 at 2.

⁵⁸ Such as flooding, hurricanes, typhoons, cyclones and mudslides, leading predominantly to internal displacement. Natural disasters can also exacerbate ‘pre- existing inequalities and patterns of discrimination’ Also see generally ‘The Climate Change- Displacement Nexus’ op cit 58 and op cit n 21 at 9.

⁵⁹ Such as reduced water availability, desertification, recurrent flooding and increased salinity in coastal zones, Kälin cited by McAdam 2009 op cit n 21 at 9.

⁶⁰ Kälin op cit n 55 at 55.

⁶¹ McAdam 2011 Complementary Protection Standards op cit n 7 at 10.

⁶² Ibid; Also see Gemenne in McAdam Complementary protection standards op cit n7 at 10 fn 44.

The nature of these five scenarios has also been divided into ‘climate processes’ (2, 3, 4) and ‘climate events’ (1,5).⁶³ However it has been pointed out that according to scientists, ‘Storms, cyclones, and so on are extreme weather – not climate – events, and for this reason it is “scientifically flawed”⁶⁴ to make the distinction between “climate events and climate processes”.⁶⁵ Although it is likely that climate change will increase the severity and/or frequency of these events, it is a gradual process, like sea-level rise.

An important observation to make about the impact of slow onset disasters is that climate processes, such as climate change, are not necessarily be the direct cause for forced displacement but may indirectly cause people to move to regions with better employment opportunities and living conditions. However, if it is no longer possible to live in a certain area because of ‘sinking coastal zones’ then such ‘population movements would amount to forced displacement and become permanent’.⁶⁶

(b) Estimating the numbers of people to be displaced

The number of people that will be displaced or who move as a consequence of the impacts of climate change is uncertain⁶⁷ and continues to be debated.⁶⁸ A maximalist school of thought estimates figures that range anywhere between 50 million to one billion by 2050.⁶⁹ The most cited amount is the estimate of Meyers that predicts that 200 million people will be displaced by 2050, but this estimate is

⁶³ Brown, O., ‘Migration and climate change’ (2008) *International Organization for Migration research series no 31* available at http://publications.iom.int/bookstore/free/MRS-31_EN.pdf accessed on 11 November 2012

at 9.

⁶⁴ McAdam 2011 Complementary Protection Standards op cit n 7 at 10.

⁶⁵ Ibid.

⁶⁶ Also see Kälin op cit n at 59.

⁶⁷ Black, R. ‘Environmental refugees: Myth or reality?’ (2001) *New Issues in Refugee Research*, Working Paper no. 34: 1-19. UNHCR available at <http://www.unhcr.org/research/RESEARCH/3ae6a0d00.pdf> accessed on 1 February 2014 at 1; Kälin & Schrepfer op cit n 4 at 11.

⁶⁸ McAdam, J & B Saul, ‘An insecure climate for human security? Climate – induced displacement and International Law’ in A Edwards and C Ferstman (eds) *Human Security and Non- Citizens: Law, Policy and International Affairs* (2010) 357 -403 Cambridge University Press, Cambridge at 401

⁶⁹ Hodgkinson, D., Burton, T., Anderson H et al ‘The hour when the ship comes In: A convention for persons displaced by climate change’ 2009, available at http://www.ccdpconvention.com/documents/Hour_When_Ship_Comes_In.pdf accessed on 3 December 2012 at 3 ; Kälin & Schrepfer op cit n 4 at 11.

contested.⁷⁰ The Stern Review estimated that 150 to 200 million people might be permanently displaced by 2050 as a result of the impacts of climate change.⁷¹ It is generally agreed that there will be ‘major forced displacement’.⁷²

Others, who follow a minimalist approach and who place emphasis on the complexity and multiple causes of movement, predict that only in a few cases will it be possible to link displacement directly to the effects of climate change.⁷³

There is, however, increasing evidence that the ‘number of people affected by climate-related sudden-onset disasters’ is ‘very substantial and likely to increase’.⁷⁴ By way of illustration, the Norwegian Refugee Council’s Internal Displacement Monitoring Centre and the United Nations Office for the Coordination of Humanitarian Affairs found that the number of people displaced by sudden – onset natural disasters in 2008 amounted to at least 36 million people; of those, more than 20 million people were displaced by climate – related disasters, while non – climate related disasters displaced nearly 16 million.⁷⁵ Climate-related disasters are inter alia linked to ‘windstorms, heavy rainfall and flooding’ and have become one of the main causes of displacement, often short-term, and the numbers of these disasters keep growing.⁷⁶ The recent IPCC Special Report on Extreme Events (SREX)⁷⁷ also mentioned that the scale of population movements is ‘likely to increase due to the impacts of climate change on vulnerable exposed communities’.⁷⁸ A study commissioned for the Stern Review estimated that 146

⁷⁰ Hodgkinson, Burton and Anderson op cit 69 at 3.

⁷¹ Kälén & Schrepfer op cit n 4 at 11.

⁷² Hodgkinson, David., & Young, Lucy., ‘In the Face of Looming Catastrophe: A Convention for Climate Change Displaced Persons’ undated, available at <http://www.ccdpconvention.com/documents/Climate%20change%20displacement%20treaty%20proposal.pdf> accessed on 3 June 2012 at 3.

⁷³ Kälén op cit n 39 at 81.

⁷⁴ Kälén op cit n 39 at 81.82.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ See generally, IPCC op cit n 9.

⁷⁸ United Nations High Commissioner for Refugees (UNHCR), UN University, the Norwegian Refugee Council and its Internal Displacement Monitoring Centre, the Special Rapporteur on the Human Rights of Internally Displaced Persons and the International Organization for Migration Joint submission to the UNFCCC SBI Work Program on Loss and Damage ‘Human mobility in the context of loss and damage from climate change: Needs, gaps, and roles of the Convention in addressing loss and damage’ (2012) available at <http://unfccc.int/resource/docs/2012/smsn/igo/106.pdf> accessed on 13 December 2013 at 2.

million people live at an altitude of less than one meter. According to the study, South Asian and East Asian populations are predominantly at risk.⁷⁹

Table 2: Estimates and forecasts of environmental displacees.⁸⁰

Source	Current estimates	Forecasts by 2010	Forecasts by 2050
El – Hinnawi (1985)	30 million	50 million	150 million
Myers (1993, 2002)	25 million	-	150, then 200 million
Myers and Kent (1995)	25 million	50 million	212 million
Stern (2007)	-	-	200 million
Christian Aid (2007)	25 million	-	300 million

Morrissey distinguishes between authors that predict a vast amount of ‘environmental refugees to accompany climate change’ and authors that deny the ‘existence of the category altogether’.

The most distinct form of movement that will result from climate change is that caused by sea-level rise, but the ‘affected numbers will be relatively small’.⁸¹ Papua New Guinea, where 68 per cent of the Pacific region’s population lives, will not be affected by sea-level rise since most of the population lives inland, but it will be impacted by other changes such as temperature, rainfall and wind patterns.⁸² It is also possible to identify the potential ‘hot spots’ of severe climate change impacts, such as sea-level rise.⁸³ Chapter 3 discusses the extreme vulnerability of

⁷⁹ Hodgkinson op cit n 72 at 3.

⁸⁰ Reproduced Gemenne, François. Environmental Change and Migration Flows (2009) Doctoral thesis, Institute d’Etudes Politiques de Paris and University of Liège at 158.

⁸¹ Castles, S. ‘Afterword: what now? Climate – induced displacement after Copenhagen’ in McAdam, J (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010) 239 – 246 Hart Publishing, Oxford at 244.

⁸² Reference to Professor Richard Bedford of the University of Waikato, New Zealand in Castles op cit n 244 at fn 16.

⁸³ Hugo, G. ‘Climate change-induced mobility and the existing migration regime in asia and the pacific’ in McAdam, J (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010) 9 – 35 Hart Publishing, Oxford at 17; Castles op cit n 244.

low-elevation coastal states and small island states, where the entire territory, such as in the cases of Kiribati and Tuvalu, is threatened. In these instances it would be easier to estimate the amount of people impacted.

The number of people displaced by the impacts of climate change at any given time should not determine the legal treatment of those affected.⁸⁴ Instead future policy developments should be flexible enough to facilitate both country specifics and further empirical research on the amount of people to be displaced within a specific country.

(c) *Defining the issue: Migration, Displacement and Refugees*

Since the 2000's, more focus has been placed by the international community on the social and humanitarian consequences of climate change.⁸⁵ The issue has gained momentum and has resulted in an increase of literature and engagement from various institutions and NGO's.⁸⁶ Various role players⁸⁷ have also undertaken work in this field.⁸⁸

Linked to the inability to determine a causal link between climate change and human movement is the difficulty of defining the issue and agreeing on

⁸⁴ McAdam & Saul op cit n 68 at 4.

⁸⁵ McAdam 2011 Complementary Protection Standards op cit n 7 at 6.

⁸⁶ Ibid.

⁸⁷ A selection of some of the role players involved, selected on no particular grounds and order: International Organization for Migration (IOM); United Nations High Commissioner for Refugees UNHCR; (In addition to persons falling with the 1951 Convention, UNHCR is mandated to protect 'persons who fear serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order' as refugees) Office of the High Commissioner for Human Rights (OHCHR); World Meteorological Organization (WMO); Norwegian Refugee Council (NRC); UNU – EHS – United Nations University, Institute for Environment and Human Security (UNU –EHS); UN Sub – commission on the Promotion and Protection of Human Rights ; Inter – Agency Standing Committee (IASC); International Committee of the Red Cross (ICRC); International Federation for the Red Cross; Amnesty International; Global Humanitarian Forum; University of Perth; University of Western Australia; University de Limoges.

⁸⁸ UN Sub – commission on the Promotion and Protection of Human Rights - Adopted resolution on 'The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous people.' Op cit n 7 at 5, This resolution called on Commission of Human Rights to appoint a Special Rapporteur to prepare 'a comprehensive study on the legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents.' This study was never undertaken; op cit n 7 at 6; During 2002 the International Federation for the Red Cross created a climate change centre to 'better understand and address the risks of climate change, in particular in the context of disaster risk reduction, disaster management and health and care programs, with a focus on the most vulnerable people.' ⁸⁸ op sit n 7 at 5 incl. fn 10; Glogov – Global Governance Project; EACH – FOR project – Environmental Change and Forced Migration Scenarios; University de Limoges – Draft Convention. Also see McAdam 2009 Gov op cit 21 at 23 for the question on 'normative case for institutionalized cooperation, and what type of cooperation should it be?' In McAdam Oxford 2011 op cit n 153 at 212 onwards McAdam provides a comprehensive account on Institutional Governance.

terminology. The importance of a suitable definition and use of correct terminology is important for a number of reasons. First, within the context of climate change the terms ‘refugee’, ‘migrant’ and ‘displaced persons’ are often loosely coupled with the words ‘climate change’ or ‘environment’ to describe people that move as a result of the impacts of climate change. Secondly, when dealing with international legal frameworks, terms such as refugee, migrant and displaced persons already define a certain legal status and provide certain rights and protection to predetermined groups of people. Finally, the differences in these legal frameworks are fundamental.⁸⁹ Labelling groups with a specific definition may either grant them some form of protection that they are not entitled to or deprive them of certain protection or rights. It can also take away protection from other groups. It is therefore, in legal terms, important to contextualize the issue at hand.

(i) The definition of a refugee

‘Refugee’ is defined in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees⁹⁰ as any person who

‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’⁹¹

The 1969 OAU Convention⁹² deals with specific aspects of Refugee issues in Africa and its definition is broader to include

‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of its country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’⁹³

⁸⁹ Kälin & Schrepfer op cit n 4 at 29.

⁹⁰ Convention relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (1951 Refugee Convention).

⁹¹ 1951 Refugee Convention op cit n 90 Article 1.

⁹² Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969 (entered into force 20 June 1974) (OAU Convention).

⁹³ OAU Convention op cit n 92 Article 1(2).

In Latin America, the criterion of ‘massive violation of human rights’ is included in the 1984 Cartagena Declaration on Refugees.⁹⁴

(ii) The definition of a migrant

‘Migrant’ is only defined in international law in the context of economic migration. Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, defines a migrant as

‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’.

The 2011 Foresight ‘Migration and Global Environmental Change’ report⁹⁵ uses the term ‘migrant’ or ‘migration’ in line with the 2009 Human Development Report to refer to individuals who have changed their place of residence either ‘by crossing an international border’ – thus international migration, or ‘by moving within their country of origin to another region, district or municipality’ – thus internal migration.⁹⁶ It should also be noted that someone is usually considered a ‘migrant’ if the duration that they stay outside their original place of residence is at least three months.⁹⁷

Within the discussion of ‘migration’ lies an important distinction between forced and voluntary migration. Rooted in this differentiation lies specific protection regime and migration policies,⁹⁸ discussed in more detail in chapter 4.

(iii) The definition of displacement

When a person is forced to move against their will, a particular form of migration occurs: displacement. There are two types of displacement: internal displacement, when people are forced to move within the borders of their own country, and displacement across borders. The Guiding Principles on Internal Displacement,⁹⁹ discussed in chapter 4, qualifies internally displaced persons as

⁹⁴ Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America (adopted 22 November 1984) available at <http://www.unhcr.org/45dc19084.html> accessed 4 February 2014 see Section 111 (3).

⁹⁵ Foresight Report op cit n 3 at 35.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Gemenne op cit n 80 at 150.

⁹⁹ Guiding Principles on Internal Displacement op cit n 37.

‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.’¹⁰⁰

In late 2013 the Peninsula Principles on Climate Change Displacement within States (Peninsula Principles)¹⁰¹ was adopted, with the following definition:

Climate displacement means the movement of people within a State due to the effects of climate change, including sudden and slow-onset environmental events and processes, occurring either alone or in combination with other factors.

It further defines: ‘Climate displaced persons’ means individuals, households or communities who face or experience climate displacement.

(iv) The problem of defining those displaced as a result of the impacts of climate change

There is a complex relationship of uncertainty between the need to conceptualize, the importance to protect existing defined groups, and ensuring adequate protection for people displaced that do not fall within existing definitions. We need to group legal subjects in legal boxes in order to determine what rights and protection they are entitled to. Currently, there is no single existing box to place those that may have to move because of the impacts of climate change. Vast amounts of literature exist on the definition issue that surrounds this topic. While it is not the aim of this paper to provide a detailed analysis of the definition discussion, it is still important to provide a brief review of some of the discussions and thoughts.

The development of a satisfactory definition for people displaced as a result of environmental factors has had a long and complex history. In the 1970s the term ‘environmental refugee’ was coined by Lester Brown, founder of the World Watch Institute. However, it is the work of Essam El-Hinnawi, published in a 1985 United Nations Environmental Programme (UNEP) paper, that placed the term within the

¹⁰⁰ Ibid.

¹⁰¹ Peninsula Principles on Climate Change Displacement within States (adopted 18 August 2013) available at <http://displacementsolutions.org/wp-content/uploads/FINAL-Peninsula-Principles-FINAL.pdf> accessed 14 January 2014 (Peninsula Principles).

public debate.¹⁰² It has been noted that this term has ‘conceptual roots reaching as far back as the 1930s.’¹⁰³ By providing a formal definition, the term ‘environmental refugee’ paved the way for work that documented migration brought upon by environmental crises. It also allowed for formulating projections of future ‘environmental refugees.’¹⁰⁴ The applicability of the 1951 Refugee Convention will be addressed in chapter 4, but for the purpose of this section it is noted that the term ‘environmental refugees’ has been contested by various role players, including the United Nations High Commissioner for Refugees (UNHCR), for having ‘no basis in international refugee law’¹⁰⁵ and because it could potentially undermine the refugee regime. In its 2008 working paper, the IASC clearly states that the terms ‘environmental refugee’ and ‘climate refugee’ have no legal basis in international refugee law, with one of the main arguments being that no person can claim that he or she is being persecuted by the environment¹⁰⁶ as per the above definition in section I(c)(i). The IASC also recommends that these terms are not to be used in official or unofficial documents. It supports the argument that using these terms could potentially undermine refugee protection and the accompanying international legal regime, that it is an inaccurate description of what are foreseen to be mostly internal movements, and that it can create confusion between the climate change, environmental degradation and migration nexus.¹⁰⁷ In 2011, the Nansen Conference noted that there was no agreed terminology and stressed that terms such as ‘climate refugees’ or ‘environmental refugees’ should be avoided since they are misleading and incorrect. It was also recognized that there is a need to clarify terminology.¹⁰⁸

¹⁰² Morrissey, J. ‘Rethinking the “debate on environmental refugees”: from “maximalists and minimalists” to “proponents and critics”’ (2012) *Journal of Political Ecology* Vol 19, 49 at 38; Brown op cit n 63 at 29.

¹⁰³ Morrissey op cit n 102 at 41.

¹⁰⁴ Morrissey op cit n 102 at 36.

¹⁰⁵ Kälin & Schrepfer op cit n 4 at 28. This issue is also addressed in more detail in Chapter 4.

¹⁰⁶ ‘While the 1951 Refugee Convention does not refer to environmental factors, refugee status may apply in exceptional circumstances if the ecosystem services that sustain a group’s livelihood are deliberately destroyed by the State as a form of persecution against a particular group.’ 2007 IOM Discussion note op cit n 47 at 2 fn 2.

¹⁰⁷ Informal group on migration/ displacement and climate change of the Inter-Agency Standing Committee (IASC) ‘Climate change, migration and displacement, who will be affected?’ (31 October 2008) available at <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> at 4. Note that a more extensive version of this paper was submitted on 15 September 2008.

¹⁰⁸ Kälin & Schrepfer op cit n 4 at 28.

There seems to be general consent that using the term environmental refugees is fundamentally incorrect¹⁰⁹ and that various discussions provide detailed analysis as to why this term should not be used.¹¹⁰

Cognisance should also be taken of the fact that often the environment is not the only migration driver. The impact that other processes, vulnerabilities as well as lack of governmental capacity to respond to disasters have on human mobility also needs to be considered. Adding the word ‘environment’ to a preexisting label, such as migrant, does not necessarily mean that the environment is the sole reason for human movement and that other influences do not play a role.

In a 2007 discussion note, the International Organization for Migration (IOM) proposed the following definition as an alternative:

‘Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.’¹¹¹

This definition was seen as a working definition, including both people displaced by natural disasters and people choosing to move as a result of deteriorating conditions, and it includes both movement within and across borders. Interesting to note that IOM does not specify what is seen as deteriorating conditions.

During 2008 the IOM referred to this definition and also suggested a revised definition that considers a sub-set of environmental migrants, “‘migration related to the impacts of climate change’”¹¹² and suggested that climate migrants are:

‘persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment as a result of climate change that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or

¹⁰⁹ IASC October 2008 Working Paper Op cit n 107 at 4 and McAdam Complementary Protection Standards op cit n 7 at 8 ‘While the term ‘refugee’ describes only a narrow sub-class of the world’s forced migrants, it is often misapplied to those who move (or who are anticipated to move) for environmental or climate reasons.... This is not only erroneous as a matter of law, but it is conceptually inaccurate as well.’ In a 2008 IOM Working Paper op cit n 63 at 31 Reference was also made to the 2007 discussion note and that in both documents the IOM ‘stays clear of the term climate change refugee due to the lack of legal grounding in international refugee law.

¹¹⁰ Söderberg, C. ‘Human Rights in a Warmer World: The Case of Climate Change Displacement’ (2011) LUP working paper no. 2011-01-28 Lund University Publications available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749357 accessed on 11 January 2013 at 35 onwards.

¹¹¹ IOM 2007 Discussion Note op cit n 47 at 1.

¹¹² IOM 2008 Discussion Note op cit n 63 at 31.

choose to do so, either temporarily or permanently, and who move either within their country or abroad.’

Whether those that move as a result of the environment make up an additional category of forced migrants was questioned in 2006 by Lassailly who asked if they are not better understood within the conceptual categories that already exist.¹¹³ While we have seen that some will fall within existing categories, and for some, displaced within borders due to the effects of climate change, the newly adopted Peninsula Principles may apply, those forced to cross borders as a result of sea-level rise is still without a definition.

In a 2011 paper Kālin makes an interesting point, one where he notes, ‘Just as we do not ask for the root causes behind the persecution of refugees (nationalism? ideologies? dissatisfaction within the army leading to a coup?), we should not ask what has caused relevant disasters.’¹¹⁴ He further suggests that when determining the appropriate protection for ‘persons fleeing their country of origin in the aftermath of a disaster, it is enough instead to consider the environmental factors combined with the temporary or permanent unwillingness or inability of the country of origin to protect affected persons.’¹¹⁵ He also urge that we should stop talking about ‘climate change’ refugees and that should we feel the urge to ‘coin a term’ we should refer to ‘persons forcibly displaced internally or across international borders by environmental factors.’

Somewhere in between the knowledge of the importance of definitions within legal instruments and the realisation that it is almost impossible to identify a clear nexus between human movement and the impacts of climate changes lies the likelihood that it might never be possible to find this desired ‘one-size-fits-all’ definition. To fill this void, the use of incorrect terminology, such as ‘climate refugees’ often occurs. The above discussion shows that this should be avoided since it may jeopardise protection to other groups of people.¹¹⁶ When it comes to conceptualisation of the issue, it is suggested that it may be more prudent to focus

¹¹³ Gemenne op cit n 80 at 147.

¹¹⁴ Kālin, W. ‘Climate Change Induced Displacement: A Challenge for International Law’ 2011, available at <http://www.mcrg.ac.in/DL3.pdf> accessed on 4 March 2012 at 33.

¹¹⁵ Kālin op cit n 114 at 34.

¹¹⁶ See Chapter 4 for the applicability of the 1951 Refugee Convention.

on the character of movement rather than a definition since continuing with the discussions does not necessarily depend on finding a suitable definition.¹¹⁷

For the purpose of this paper it is sufficient to note that we are dealing with human mobility caused by a ‘special case of slow-onset disasters’¹¹⁸ resulting in people leaving their homes, either voluntarily or involuntarily, and in the specific instance of small island states, forced to cross borders, permanently displaced from their homelands – the ultimate form of adaptation.

¹¹⁷ Kälin & Schrepfer op cit n 4 at 2.

¹¹⁸ See fn 35.

CHAPTER 3 SMALL ISLAND STATES AND CLIMATE CHANGE

I. SMALL ISLAND STATES AS A PARTICULAR VULNERABLE GROUP

While it has been established that it is difficult to determine the direct causal link between human movement and the effects of climate change¹¹⁹ it is also important to understand that different kinds of pressures and impacts are experienced with each type of scenario described by Kālin. The impacts of climate change will then lead to different types of decisions made by different types of households at different times and location, making it almost impossible to design a single legal or policy framework that appropriately addresses all types of movement¹²⁰ at all.

With low historic contributions to greenhouse gas emissions and central to the debate of displacement are small island states. Small in size, exposed to natural disasters, with open economies and limited adaptive capacity.¹²¹ Confronted by various environmental drivers, forcing decision making, there is one impact of slow onset events that stands out: sea-level rise.¹²² The IPCC predicts in its 4th report, 2007, that it is expected that sea-level rise will threaten important infrastructure and other structures that support the livelihood of communities living on Pacific Islands¹²³ it further notes, ‘Many millions more people are projected to be flooded every year due to sea-level rise by the 2080s. Those densely – populated and low-lying areas where adaptive capacity is relatively low, and which already face other challenges such as tropical storms or local subsidence, are especially at risk. The numbers affected will be largest in the mega – deltas of Asia and Africa while small islands are especially vulnerable.’ More specifically the Fourth Report indicates

¹¹⁹ Kālin & Schrepfer op cit n 4 at 2.

¹²⁰ McAdam 2011 Complementary Protection Standards op cit n 7 at 11.

¹²¹ Hodgkinson & Burton op cit n 69 at 42.

¹²² The Cancún Adaptation Framework, ‘Draft Decision -/CP.16: Outcome of the Work of the Ad Hoc Working Group on Long- Term Cooperative Action under the Convention’ FCCC/CP/2010/7/Add.1 (adopted December 2010).

Available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> accessed on 3 February 2014 includes sea-level rise as one of the main impacts of slow onset events; also sea - level rise in the 5th IPCC report is discussed *inter alia* at:

Real Climate provides a discussion on sea-level rise in light of the Fifth Assessment Report, the blog entry is available at: <http://www.realclimate.org/index.php/archives/2013/10/sea-level-in-the-5th-ipcc-report/> accessed 22 November 2013.

¹²³ Forced Migration Report op cit n 18 at 51.

that many small islands are ‘highly vulnerable to the impacts of climate change and sea-level rise.’¹²⁴ These words cannot be misunderstood: small islands states are highly vulnerable to the impacts of climate change.¹²⁵

‘Four interrelated factors’ contribute to the overall vulnerability of small island States.¹²⁶

- (a) the degree of exposure to climate change
- (b) a limited capacity to adapt to projected impacts
- (c) the fact that adaptation is not a high priority, in light of other pressing problems¹²⁷
- (d) uncertainty surrounding global climate change projections and their local validity

In fact, the vulnerability of certain small low-lying islands and the importance of protecting these territories for sea-level rise received recognition as far back 1992, making its way in Agenda 21, Chapter 17¹²⁸

‘They are considered extremely vulnerable to global warming and sea- level rise, with certain small low-lying islands facing the increasing threat of the loss of their entire national territories. Most tropical islands are also now experiencing the more immediate impacts of increasing frequency of cyclones, storms and hurricanes associated with climate change. These are causing major set- backs to their socio-economic development.’

¹²⁴ IPCC Fourth Report Chapter 16.2.1 op cit n 17.

¹²⁵ The Pacific Small Island Developing States provides an overview of changing weather patterns in the region as well as the impacts of sea –level rise in its ‘Views on the Possible Security Implications of Climate Change to be included in the report of the Secretary-General to the 64th Session of the United Nations General Assembly’ available at: http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf accessed on 13 October 2013.

¹²⁶ IPCC conclusions as in McAdam op cit n at 10.

¹²⁷ It needs to be mentioned that more progress is being made on the adaptation front in small island states and in their book ‘Climate Change and Small Island States: Power, Knowledge and the South Pacific (Google eBook) John Campbell, Jon Barnett, at 111 an overview of the projects and programmes in the Pacific is provided. More information on ‘Approaches to address incremental change in small island developing States’ is to be found in: United Nations Framework Convention on Climate Change SBI, ‘A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change’ (2012) *FCCC/SBI/2012/INF.14* available at <http://unfccc.int/resource/docs/2012/sbi/eng/inf14.pdf> accessed on 2 December 2013 at 64 onwards.

¹²⁸ Agenda 21, Chapter 17 para 17.125 United Nations GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992) available at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

One impact that they are most vulnerable to is confirmed in the recent IPCC report: ‘Global sea level will continue to rise during the 21st century. Under all RCP scenarios the rate of sea level rise will very likely exceed that observed during 1971 – 2010 due to increased ocean warming and increased loss of mass from glaciers and ice sheets.’¹²⁹ The IPCC also stated that because of the ‘improved physical understanding of the component of sea level, the improved agreement of process-based models with observations, and the inclusion of ice-sheet dynamical changes’ the confidence in projections of global mean sea level rise has increased.¹³⁰

According to the IPCC sea-level rise is expected to ‘exacerbate inundation, storm surge, erosion and other coastal hazards’ and that it is likely that coral reefs, fisheries and other marine-based resources are to be heavily impacted by climate change. It also states that it is ‘very likely that subsistence and commercial agriculture on small islands will be adversely affected by climate change’.¹³¹ Generally, environmental degradation will be slow¹³² and certain specifics of environmental change in low-elevation coastal zones are highlighted in the Foresight Report.¹³³ Examples of loss and damage suffered by *inter alia* small island States as a result of sea-level rise are listed in a recent SBI document:¹³⁴

- salinization of soils and reduced crop yields in cultivated areas
- drinking water impairment from salinity intrusion into coastal aquifers
- inundation and erosion of coastal ecosystems, including mangroves
- loss of fish habitat and reduced fish production
- damage to coastal infrastructure, including roads and port facilities;
- and loss of territory

The loss of territory undoubtedly creates the image that in certain instances small island states may ‘disappear’.

accessed on 11 November 2012.

¹²⁹ SPM op cit n 9 at 18.

¹³⁰ Ibid.

¹³¹ IPCC Fourth Report Chapter 16.2.1 op cit n 17; Gemenne op cit n 80 at 177.

¹³² See Kälén and Schrepfer op cit n 4 at 15: The process will include: ‘loss of coastal land and infrastructure due to erosion, inundation, sea-level rise and storm surges; an increase in the frequency and severity of cyclones, creating risks to life, health and homes; loss of coral reefs, with attendant implications for the ecosystems on which many islanders’ livelihoods depend; changing rainfall patterns, leading to flooding in some areas, drought in others, and threats to fresh water supplies; salt-water intrusion into agricultural land; and extreme temperatures.

¹³³ Foresight Report op cit n 3 at 77.

¹³⁴ See generally technical paper op cit n 53.

II. 'DISAPPEARANCE' OF SMALL ISLAND STATES

The first image that comes to mind when the phrase 'disappearance' of small island states is mentioned is often that of submerged territory. A preliminary issue addressed here is the appropriateness of the word 'disappearance' in the context of climate change.

The Oxford Dictionary defines 'disappear' as 'to become no longer visible; to stop existing; to be lost or impossible to find',¹³⁵

Within the climate change displacement debate small island states are often referred to as 'sinking islands'¹³⁶ based on the assumption that there will come a time where these territories will either become uninhabitable or disappear completely, leaving us with images of submerged islands and nations without a home.

In most cases these territories will become inhabitable¹³⁷ long before they are submerged under water. International law governs the conventional ways in which a state can become extinct, state succession, merger with another state, or dissolution, but there is no law that governs the actual disappearance of a state. In these conventional ways of state extinction, a successor state continues to exist, or it takes control over the territory of another state.

The 'disappearance' of small island states is not a sudden onset disaster but rather a slow-onset disaster that will occur gradually.¹³⁸ Initially persons might move to other islands that belong to the same country. Persons might also chose to migrate abroad where human rights law protects them.¹³⁹ There will however be instances where as a result of sea-level rise inhabitants of small islands states will not have main islands or higher ground to move to and it will be impossible to remain on their home islands, becoming permanently displaced to other countries. These groups of people are neither refugees nor migrants, and without territory the existence of the states are jeopardised.

¹³⁵ Hornby, A. S. *Oxford Advanced Learner's Dictionary of Current English* (1996) Oxford University Press.

¹³⁶ McAdam 2011 *Disappearing States* op cit n 11 at 109.

¹³⁷ McAdam 2011 *Disappearing States* op cit n 11 at 108.

¹³⁸ See generally Kälin op cit n 39.

¹³⁹ *Ibid.*

III. THE QUESTION OF ‘STATELESSNESS’ CAUSED BY RISING SEA-LEVELS

Within the context of sea-level rise, and the notion of territories that will now longer be habitable, be it because of salination of freshwater or floods and storm surges, the issue of ‘statelessness’ arise. Similar to the nexus issue and the definition issue, the question around ‘statelessness’ is not as clear-cut as the images of islands disappearing under water, taking its nationality with it to a water grave. Crucial to this topic is to understand the difference between ‘state’ and ‘statelessness.’ In simple terms, the disappearance of a state, in this case mostly perceived as territory that is habitable, might leave a person without a physical state to live in but it does not render that same person ‘stateless.’ The following section aims to clarify this misconception since statelessness is coupled with the lack of recognized nationality and not necessarily the lack of territory. This is an important clarification to make since the issue of ‘statelessness’ is often mentioned in discussions about low-lying territory within the context of climate change. In Table 3 discussed below, it is noted that

‘Should a state lose its entire territory, one of the constituent elements of statehood, it is not clear whether its statehood would continue to be recognised by the international community. There is a risk that its population would be rendered stateless. While UNHCR has a mandate for the prevention of statelessness and the protection of stateless persons, specific arrangements will need to be forged which permit for the movement elsewhere and prevent statelessness.’¹⁴⁰

It is important to unpack this statement further and to determine if it would indeed be the case and if this statement is true. Key to this statement is ‘it is not clear whether its statehood would continue to be recognized by the international community’ should a state lose its territory. The important issue here is whether or not the international community would recognise ‘statehood’ once a particular territory ceases to exist. Will it be correct to assume that if statehood no longer exists that the population would become stateless?

To answer this, it is important to briefly examine statehood, the elements; how states cease to exist, the issue around statelessness and most importantly statelessness in the context of climate change.

¹⁴⁰ Table 3.

There is no internationally agreed definition of what constitutes a state. It is regarded that the formulation of statehood as contained in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States¹⁴¹ reflects customary international law. In accordance with Article 1:

‘The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.’

From this article, the four establishing elements of statehood can be derived as a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.¹⁴² Territory is an important requirement for statehood, and exclusive control over such territory is inherent hereto.¹⁴³ Yet, it does not seem as if there is a specified amount of territory that needs to be held. The ‘mechanism of the government in exile’¹⁴⁴ also allows for interpretation that it is possible that the territory requirement only refers to ‘territory to be held’ and not territory to be occupied. Can one thus argue that a state must be in ‘possession of territory’ that is under its exclusive control¹⁴⁵ but not necessarily occupying such territory? Is there an assumption that to meet the requirement that states have a ‘certain coherent territory effectively governed’ that a population remains on that territory to be governed, or can we argue differently? Where governments operate from outside national territory, states can continue to function.¹⁴⁶ However, this would be the instance of governments in exile that has always been contemplated as temporary and exceptional. In its submission to the UNFCCC, UNHCR indicates that there is agreement that there must be ‘territory inhabited by a permanent population under the control of an effective government’¹⁴⁷ It also mentions that independence has been cited as a ‘central criterion’ of statehood.

¹⁴¹ Montevideo Convention on the Rights and Duties of States, adopted 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

¹⁴² McAdam Complementary Protection Standards op cit n 11 at 110.

¹⁴³ McAdam Complementary Protection Standards op cit n 11 at 112.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ UNHCR supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC) ‘Climate Change and Statelessness: An Overview’ (2009) Joint Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) available at <http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf> accessed on 4 February 2014 at 1

Once firmly established, there is a strong presumption against the extinction of states.¹⁴⁸ This presumption of continuity of existing states leads to the next derivative, the fact that the lack of one, or even all four, criteria may not mean the end of a state.¹⁴⁹ It is also noted that there have been only a few cases of extinctions of states and virtually no cases of involuntary extinction of states since the establishment of the United Nations Charter in 1945.¹⁵⁰ International law nevertheless makes provision for the disappearance of states, but not the type of ‘disappearance’ that is associated with rising sea-levels. The impacts of climate change give rise to new legal issues, issues that were not foreseen during the drafting of international agreements that govern the issue around states that cease to exist. International law¹⁵¹ governs the conventional way in which a state would ‘disappear’, or rather become extinct or cease to exist. It comes about through either ‘voluntary absorption by another State, merger with another State, or extinction by dissolution (voluntary or involuntary).’¹⁵² It has also been said that in ‘international law, when a State ceases to exist, so does the nationality of that State.’¹⁵³ In contrast to how we have come to perceive the notion of ‘disappear’ in the climate change context, when a state conventionally becomes extinct, there is never a ‘void’¹⁵⁴ but always a successor state. This is defined as ‘the replacement of one State by another in the responsibility for the international relations of territory’¹⁵⁵ and therefore the nationality ceases to exist.

What happens if there is no successor state? In the case of a small island states that will ‘disappear’ because of the impacts of climate change the conventional rules of state succession will only apply if the territory were ceded to another state.¹⁵⁶ McAdam argues: ‘for this reason the conventional international

¹⁴⁸ McAdam *Complementary Protection Standards* op cit n 11 at 110 fn 33; Kälin & Schrepfer op cit n 4 at 38.

¹⁴⁹ McAdam *Complementary Protection Standards* op cit n 11 at 111.

¹⁵⁰ *Ibid.*

¹⁵¹ Vienna Convention on Succession of States in Respect of Treaties, adopted 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, adopted 8 April 1983, UN Doc A/CONF.117/14 (not in force yet).

¹⁵² McAdam, J. *Climate change, forced migration, and international law* (2011) Oxford University Press, Oxford at 127.

¹⁵³ McAdam 2011 *Disappearing States* op cit n 11 at 129.

¹⁵⁴ McAdam 2011 *Oxford* op cit n 152 *Disappearing States* at 127.

¹⁵⁵ Vienna Convention on Succession of States in Respect of Treaties Art 2(1)(b); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts Art 2(1)(a).

¹⁵⁶ McAdam 2011 *Oxford* op cit n 152 at 128.

law rules on extinction are largely inapplicable to the climate change context.’¹⁵⁷ Without the use of existing international law to determine if a state has ceased to exist, the elements that lead to the creation of a state are examined and used to determine if there is a point where ‘the absence of certain criteria of statehood might lead other states (and the international community, through international organizations) to conclude that a state no longer exists.’¹⁵⁸ Literature indicates that all four criteria need to be fulfilled for a state to come into existence, yet it does not imply that the lack of certain elements may result in the end of a state.¹⁵⁹ In addition, there is a strong assumption of ‘continuity of existing states’.¹⁶⁰

Statelessness is a legal concept that is not dealt with very well.¹⁶¹ When the issue is combined with climate change, it brings even more challenges. Two existing legal instruments need to be discussed in order to further clarify the misconception that the disappearance of territory implies statelessness. Currently statelessness is dealt with by the 1954 Convention relating to the Status of Stateless Persons¹⁶² as well as the 1961 Convention Relating to the Status of Stateless Persons. In accordance with Article 1 of the 1954 convention a ‘stateless person’ refers to a ‘person who is not considered as a national by any State under the operation of its law’.

It is important to differentiate between ‘statehood’ and ‘statelessness’. Statelessness means that someone is ‘without a nationality not without a state’¹⁶³ and that it is a result of the lack of recognition of such nationality by the international community. It is my interpretation that when all four elements of statehood cease to exist, a person is indeed without a state. However, this does not render the same person ‘stateless’ under Article 1 of the 1954 Convention because in order to meet this definition this person should not be considered a national by any state under the operation of its law. It thus depends on not receiving this particular recognition and not necessarily territory that ‘disappears’. The

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ McAdam 2011 Oxford op cit n 152 at 129.

¹⁶⁰ McAdam 2011 Oxford op cit n 152 at 128.

¹⁶¹ Johnstone Craig, former deputy High Commissioner of the UNHCR during side event at Bonn Germany June 2009, author in attendance; see generally Kälin & Schrepfer op cit n 4 at 37 – 40.

¹⁶² Convention relating to the Status of Stateless Persons, adopted 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

¹⁶³ Kälin op cit n 39 at 101.

recognition of nationality is of vital importance to island communities and is a discussion that will be picked up again later in this Chapter.

International law does protect nationality: Article 15 of the 1948 Universal Declaration of Human Rights recognises every persons right to nationality. It stipulates:

‘everyone has a right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.’

Corollary to this is the principle of prevention of statelessness. The principles of nationality and prevention of statelessness are both addressed in specific instruments¹⁶⁴ as well as other international and regional human rights instruments.¹⁶⁵ Where foreseeable, statelessness should be prevented¹⁶⁶ but once again these instruments were drafted before climate change issues emerged. During 1996, the United Nations General Assembly (UNGA) gave a global mandate to UNHCR to engage in preventing and reducing statelessness as well as to protect stateless persons.¹⁶⁷

In its 2009 submission¹⁶⁸ to the UNFCCC, UNHCR submitted two possible options to prevent statelessness in the context of small island states.

1. Territory elsewhere would be ceded to the affected State to ensure its continued existence. If other States agree that this was the same State, statelessness would not arise;
2. Union with another state would be another option¹⁶⁹

¹⁶⁴ The Convention on the Reduction of Statelessness, adopted 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) (1961 Statelessness Convention). specifically deals with the prevention and reduction of statelessness.

¹⁶⁵ May 2009 submission op cit n 147 at : 1996 International Covenant on Civil and Political Rights; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; 1979 Convention on the Elimination of All Forms of Discrimination Against Women; The 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1957 Convention on the Nationality of Married Women. At a regional level: 1990 African Charter on the Rights and Welfare of the Child, the 2005 Covenant on the Rights of the Child in Islam, the 1948 American Declaration on the Rights and Duties of Man, the 1969 American Convention on Human Rights and the 1997 European Convention on nationality.

¹⁶⁶ UNHCR May 2009 submission op cit n 147 at 2.

¹⁶⁷ General Assembly Resolution GA/RES/50/152, 9 February 1996, paras. 14-15 and unhr submission p2, footnote 11. ‘This mandate is additional to its earlier mandate to undertake the functions foreseen under Article 11 of the 1961 Convention first given in 1974 and then extended through resolutions GA/RES/3274(XXIX), 10 December 1974, and GA/RES/31/36/, 30 November 1976.’

¹⁶⁸ UNHCR May 2009 submission op cit n 147 at 2.

¹⁶⁹ Safeguards to prevent statelessness are provided for in this instance by the 1961 Convention and the Draft Articles on the Nationality of Natural Persons in Relation to Succession of States. In

Whether or not small island states would consider the latter option remains an open question.

The 1954 Convention¹⁷⁰ considers a ‘stateless person’ a ‘person who is not considered as a national by any State under the operation of its law.’ International law¹⁷¹ generally deals with *de jure* statelessness that is based on the ‘denial of nationality through the operation of the law of a particular State’¹⁷² and not *de facto* statelessness ‘where a person formally has a nationality, but which is ineffective in practice.’¹⁷³ However, the non-binding Final Act of the 1954 Convention relating to the Status of Stateless Persons suggests ‘persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality’¹⁷⁴

A 2009 Report submitted by the Secretary-General to the UNGA highlights the prevention of statelessness and it also lists unprecedented climate change challenges for which the existing mechanisms may not be able to provide adequate solutions:¹⁷⁵

[.....] A second is the prospect of ‘statelessness’ of citizens of submerged island nations, which raises important legal issues concerning national sovereignty, claims over marine resources, and the rights and relocation of citizens of such territories. Legal and political arrangements may be necessary for the protection of affected populations.

The principle of prevention of statelessness is also highlighted in this and refers to ‘the possibility of new cases of statelessness in the context of submerged small island states’ - and ‘suggests multilateral comprehensive agreements as a legal basis

accordance with Article 21 ‘citizenship should be automatically extended to all citizens of the predecessor island State,’ as in UNHCR May 2009 submission op cit n 147 at 2. Also, Article 10 of the 1961 Convention deals with the transfer of territory. In accordance with paragraph 1, ‘every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.’ paragraph 2: ‘In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer of acquisition.’

¹⁷⁰ UN Convention on Statelessness op cit n 162.

¹⁷¹ 1954 Convention Art 1(1).

¹⁷² McAdam 2011 Disappearing States op cit n 11 Disappearing states at 119.

¹⁷³ Ibid; See generally UNHCR May 2009 submission op cit n 147.

¹⁷⁴ McAdam 2011 Disappearing States op cit n 11 at 119 and 120.

¹⁷⁵ United Nations General Assembly ‘Climate change and its possible security implications’ Report of the Secretary – General A/64/350 (11 September 2009) available at <http://www.refworld.org/pdfid/4ad5e6380.pdf> accessed on 12 January 2013 at para 72 & 101.

regulating admittance to identified territories, stay and status of affected populations',¹⁷⁶

Some important observations need to be made in terms of statelessness and relying on the 1961 Statelessness Convention. First of all, the Convention is 'reactive rather than proactive',¹⁷⁷ and can only be relied upon once an individual enters the country of another, secondly the Convention is poorly ratified, and most countries do not have 'formal procedures' in place to determine the legal status of a person that may be stateless, thus no clear way of how the Convention's benefits can be accessed.¹⁷⁸ Also, statelessness is when someone is denied his or her nationality. Given the global nature of climate change and the obligation amongst states to cooperate, it remains to be seen if the international community would deny those displaced by climate change their nationality.

A further crucial issue is that small island states have indicated that they will try to maintain their presence of statehood as long as possible.¹⁷⁹ It is possible that small island states will be recognized as a legal entity as long as they have a government and a population maintaining citizenship, and if nobody is ready to formally end their statehood.¹⁸⁰ In this regard it has been pointed out that international law would be 'flexible enough to provide for the continued existence of such states as non-territorial entities'.¹⁸¹ What is then important is not to try and answer the question around statelessness but instead to address the issue around protecting the rights of citizens of territories that will no longer be habitable or that will be inundated by sea-level rise and to ensure that they 'are admitted to other countries on a permanent basis where they can keep their nationality of origin even

¹⁷⁶ Kälin & Schrepfer op cit n 4 at 51.

¹⁷⁷ McAdam, Jane. (Professor, Faculty of Law, University of New South Wales), Address at the Nansen Initiative, Pacific Regional Consultation 'Climate Change, Displacement and the Role of International Law and Policy' 22 May 2013 *Cook Islands* available at <http://www.nanseninitiative.org/sites/default/files/Climate%20Change,%20Displacement%20and%20the%20Role%20of%20International%20Law%20and%20Policy.pdf> accessed on 12 January 2014 at 2.

¹⁷⁸ McAdam *Cook Islands* op cit n 177 at 3.

¹⁷⁹ In McAdam *Swimming Against the Tide* 2011 op cit n 16 at 6 fn 30 reference is made to the President of Kiribati mentioning the possibility of eventually relocating the government to Banaba, situated on high land, to continue a presence on their territory for as long as possible.

¹⁸⁰ Kälin op cit n39 at 102.

¹⁸¹ *Ibid.*

if they or their descendants acquire the nationality of that country and how their rights can be guaranteed in a way to avoid marginalisation.’¹⁸²

In the context of sea-level rise threatening the complete physical loss of small island state territories, it is not correct to assume that this loss indicates the practical end of the national sovereignty and the protection and rights of these states and its people since states will continue to exist *de jure* and not *de facto* as imagined when the word ‘disappear’ is used.¹⁸³

IV. OPTION OF RELOCATION

Not having high ground for internal resettlement is a significant problem for small island states when faced with sea - level rise. For most problems or rising issues one makes an attempt to try and identify options, answers and/or solutions. Within the context of ‘entire islands disappearing’, one solution that has been mentioned is that of relocating the people of those territories to a new home. Since there is no available land to occupy within the existing borders, this relocation will be of an international nature.

In 2005 and at the 60th session of the UNGA, Anote Tong, the President of Kiribati highlighted that it might be too late to consider other forms of adaptation but that there is a need for nations to seriously consider the ultimate form of adapting to climate change, relocation.¹⁸⁴ The people of Kiribati have migrated before. Phosphate mining destroyed Kiribati’s Banaba Island and its environment in the 1940’s, resulting in the vast majority of the population migrating to Rabi in Fiji. It has been reported that during 2005, the Carteret Islands of Papua New Guinea became the first inhabitants of low-lying islands to evacuate and resettle their 2600 islanders to Bougainville Island, a larger island.¹⁸⁵ The islanders from

¹⁸² Ibid.

¹⁸³ Hodgkinson & Burton op cit n 69 at 42-

¹⁸⁴ Forced Migration Report op cit n 18 at 51; See McAdam Oxford op cit n 152 at 143 for reference to 86 relocations of whole communities within the Pacific.

¹⁸⁵ UN Secretary General Report op cit 175 at 20; IRIN, Service of the UN Office for the Coordination of Humanitarian Affairs: Humanitarian news and analysis, ‘Papua New Guinea: The world’s first climate change “refugees”’ available at <http://www.irinnews.org/report/78630/papua-new-guinea-the-world-s-first-climate-change-refugees> accessed on 3 February 2014.

the Bay of Bengal and Vanuatu were also forced to move as a result of sea-level rise.¹⁸⁶

Relocation of the remaining inhabitants, as the ultimate form of adaptation, is an option that cannot be ignored.¹⁸⁷ Some of a countries' citizens may voluntarily migrate to countries where they can be absorbed as part of the workforce; however, there will be cases of islanders that will not have the capacity to move nor the desire and who will stay close to their homeland for as long as possible. It is preparedness and foresight to assist those that need to be relocated that is much needed. Both islands, Kiribati and Tuvalu have addressed the option of relocation with Australia and New Zealand¹⁸⁸ and while there are reports of the Tuvaluan Prime Minister stating that the possibility of buying land in a 'near-by country, in case we become refugees to the impacts of climate change'¹⁸⁹ has been explored, the general feeling regarding relocation plans is that people do not want to contemplate it as a potential option.¹⁹⁰ Also, in principle international law would not prevent 'the reconstruction of a State such as Kiribati or Tuvalu within an existing State, such as Australia' but the 'political likelihood' of this happening is slim.¹⁹¹

Interesting topic nonetheless, one that can be debated academically across various forums, but these discussions need to incorporate the wish of affected communities. While it is evident from the input¹⁹² provided to the Secretary General Report that Pacific Small Island Developing States (PSIDS) expressed inter alia the likelihood of loss of islands and that 'once the islands are lost to sea-level rise, the people will never be able to return to their homelands.'¹⁹³ Inhabitants of

¹⁸⁶ Forced Migration Report op cit n 18 at 20; McAdam 2011 Disappearing states op cit n 16 at 3 fn 10.

¹⁸⁷ Hugo op cit n 83 at 28 discusses lessons drawn from resettlement experience within countries in the Asia – Pacific region and it is mentioned that these can be used to draw upon in efforts to plan resettlement as a result of climate change – related movement. It needs to be noted that most of these examples relates to internal resettlement.

¹⁸⁸ McAdam 2011 Oxford op cit n 7 at 144.

¹⁸⁹ Ibid.

¹⁹⁰ McAdam 2011 Oxford op cit n 7 at 145. This section also gives a good overview of the various statements made by the Tuvaluan Government and the general feeling regarding the option of relocation.

¹⁹¹ McAdam Oxford op cit n 7 at 147. This section also provides a detailed discussion of such a possibility and the principles of international law relating to the cession of territory that needs to be adhered to.

¹⁹² In response to call made in A1RES/63/281.

¹⁹³ SIDS views at op cit n 125 at 11.

islands have strong ties and connection with their land¹⁹⁴ and the predominant wish is to remain in their homes for as long as possible.¹⁹⁵ Yet in 2008, Anote Tong, the President of Kiribati states¹⁹⁶:

‘We want to begin that [migration] now, and do it over the next twenty, thirty or forty years, rather than merely, in fifty to sixty years time, simply come looking for somewhere to settle our one hundred thousand people because they can no longer live in Kiribati, because they will either be dead or drown. We begin the process now, it’s a win-win for all and very painless, but I think if we come as refugees, in fifty to sixty years time, I think they would become a football to be kicked around.’

It is an unfortunate reality that in certain instances inhabitants of small island states will be forced to leave their homes and country, permanently.

¹⁹⁴ Kälén & Schrepfer op cit n 4 at 43.

¹⁹⁵ McAdam *Swimming Against the Tide* 2011 op cit n 16 at 3.

¹⁹⁶ McAdam 2011 Oxford op cit n7 at 1.

CHAPTER 4 THE ROLE OF INTERNATIONAL LAW IN ADDRESSING THE QUESTION OF DISPLACEMENT CAUSED BY SEA-LEVEL RISE

I. EXISTING INTERNATIONAL LEGAL INSTRUMENTS AND SOFT LAW

Various bodies of international law are important and relevant to this discussion, including international refugee law, international human rights law, international humanitarian law and international environmental law.¹⁹⁷ Each of these branches has their own specific legal instruments and principles that may be applicable in certain instances. However, as will be elaborated on below, they do not necessarily provide the answer to small islands states, threatened by sea-level rise, and its people that will be displaced.

In a 2011 review¹⁹⁸ commissioned as part of the Foresight Project referred to in Chapter 2, the different legal and normative frameworks that are relevant to human movement, both internal and across borders, are listed as:

1. ‘Universal Declaration of Human Rights: Free mobility within states and right to leave and re-enter one’s own country; right to seek and enjoy asylum

¹⁹⁷ *Inter alia* the 1951 Convention Relating to the Status of Refugees – in accordance with the 1951 Convention, Stateless Refugees are protected and are defined as persons ‘who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’ Protocol relating to the Status of Refugees, adopted 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); The preamble of the 1954 Convention Relating to the Status of Stateless Persons reads: ‘Considering that only those stateless persons who are also refugee are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention.’ The 1961 Convention on the Reduction of Statelessness; Convention on the Reduction of Statelessness (adopted 30 Aug 1961) entered into force 13 December 1975 989 UNTS 175 (1961 Convention); Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978 entered into force 6 November 1966) 1946 UNTS 3; Vienna Convention on Succession of States in Respect of State Property (adopted 8 April 1983, not yet in force) Guiding Principles on Internal Displacement, these principles reflect international human rights law and international humanitarian law. The international community recognizes these set of principals as an important international framework for the protection of IDPs. These principles have also been used increasingly by States in the development of national laws or policies in Africa. (2008 ISAC working paper; also note that ‘states that have ratified the Great Lakes Protocol on internal displacement are obliged to incorporate them into their domestic law.’) Other frameworks include, The United Nations Declaration of Human Rights; United Nations International Covenant on Economic, Social and Cultural Rights, The Hyogo Framework, International Migration Law.

¹⁹⁸ Martin, Susan. F., ‘Review of legal and political framework which affects migration, including institutional architecture and capacity and how it is affected by future environmental change’ 2011 available at <http://www.bis.gov.uk/assets/foresight/docs/migration/drivers/11-1183-dr13-review-legal-and-political-framework-affects-migration.pdf> accessed on 4 December 2013 at 34.

(no government had an obligation to provide asylum or to admit those seeking entry);

2. 'General human rights conventions, including International Covenant on Civil and Political Rights, International Covenant on Economic and Social Rights, Convention on the Rights of the Child, Convention on Racial Equality and Convention on the Elimination of all Forms of Discrimination Against Women;
3. ['Voluntary' migration conventions, including Convention on the Rights of All Migrant Workers and Members of their Families and International Labour Organization conventions (poorly ratified)];¹⁹⁹
4. 'Involuntary displacement instruments, including Convention Relating to the Status of Refugees (strong ratifications) Guiding Principles on Internal Displacement (non-binding) and Humanitarian Law (Laws of War) Common Article 3 on civilian protection (strong ratifications but poor enforcement);
5. 'Both: Convention to Combat Organized Crime's Protocols on Smuggling and Trafficking (strong ratifications but focus on enforcement, not protection).'²⁰⁰

In its October 2008 working paper²⁰¹ the IASC describes how existing international legal frameworks may apply to populations affected by the impacts of climate change and environmental degradation as well as certain gaps that may exist. These legal frameworks are depicted in table 3.

¹⁹⁹ Own brackets, since existing international migration mechanisms are already referred to in section 4.

²⁰⁰ Martin op cit n 198 at 8.

²⁰¹ IASC October 2008 Working Paper op cit n 107.

Table 3: Existing international legal frameworks and the possible application thereof

Source: Informal group on migration/ displacement and climate change of the Inter-Agency Standing Committee (IASC) 'Climate change, migration and displacement, who will be affected?' (31 October 2008)²⁰²

Cause of movement	Nature of Movement	Existing Legal framework
(a) Hydro-meteorological extreme hazard events	<p>Temporary forced displacement as a result of a specific hazard event within national borders</p> <p>Temporary forced displacement across international borders as a result of a specific hazard event</p> <p>Temporary voluntary movement across international borders as a result of a specific hazard event</p> <p>Forced displacement as a result of areas being designated as prohibited for habitation by authorities potentially resulting in internal displacement, forced cross-border movements and/or voluntary cross - border movement.</p>	<p>Those moving within existing borders are currently protected by</p> <ul style="list-style-type: none"> ❑ international human rights law if they move voluntarily; ❑ international human rights law and the Guiding Principles on internal displacement if they are forcibly displaced. <p>Those moving across international borders:</p> <p>Potential gap 1: Those moving across international borders as a result of hazard events (and subsequent designation of prohibited areas) are protected by international human rights law, which,</p>

²⁰² Table available at: <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> accessed on 1 February 2014.

		<p>however, does not entitle them to admission and stay in another country. They are not automatically protected by the 1951 refugee convention, unless they meet established criteria. In some cases, they might be in need of protection and assistance temporarily pending return. More analysis is necessary to determine if some may be covered by existing regional convention regardless of their formal status</p>
<p>(b)Environmental degradation and/or slow onset extreme hazard events</p>	<p>Such process will likely be gradual, beginning with voluntary movements (in-and outside the country) and potentially ending in forced displacement (in-and outside the country). Environmental degradation whether at early or advanced stages and/or slow onset disasters may also result in areas being prohibited for habitation by</p>	<p>Those moving within existing borders are currently protected by</p> <ul style="list-style-type: none"> ❑ international human rights law if they move voluntarily; ❑ international human rights law and the Guiding Principles on internal displacement if they are forcibly displaced. <p>Potential gap 1: Those moving across</p>

	authorities leading to internal displacement, forced cross-border movements and/or voluntary cross-border movements (see above)	international borders (see above) Potential gap 2: There is a lack of criteria to distinguish between voluntary and forced movements in hazard related disaster settings.
(c) Significant permanent losses in state territory as a result of sea level rise etc.	Such process if not prevented by sufficient mitigation, could be gradual, beginning with voluntary movements (in- and outside the country) and potentially ending in forced displacement (in- and outside the country). These could also include: <ul style="list-style-type: none"> ❑ voluntary movements inside the country (to safer parts of the country) and across internationally recognized borders ❑ displacement within the national territory ❑ forced cross-border movements, including in extreme cases the entire loss of territory. 	Those moving within existing borders are currently protected by <ul style="list-style-type: none"> ❑ international human rights law if they move voluntarily; ❑ international human rights law and the Guiding Principles on internal displacement if they are forcibly displaced. Potential gaps 1 & 2 (see above) Potential gap 3: Should a state lose its entire territory, one of the constituent elements of statehood, it is not clear whether its statehood would continue to be recognised by the international community. There is a

		<p>risk that its population would be rendered stateless. While UNHCR has a mandate for the prevention of statelessness and the protection of stateless persons, specific arrangements will need to be forged which permit for the movement elsewhere and prevent statelessness.</p>
<p>(d) Armed conflict/violence over shrinking natural resources</p>	<p>Forced displacement in the case of such armed conflict or violence could result internal displacement or in people crossing international borders as refugees or persons under temporary or subsidiary forms of protection.</p>	<p>Those moving within existing borders are currently protected by:</p> <ul style="list-style-type: none"> ❑ International humanitarian law (IHL) ❑ International human rights law ❑ The Guiding Principles on Internal Displacement <p>Those moving across international borders could be protected by</p> <ul style="list-style-type: none"> ❑ International humanitarian law (IHL) ❑ International human rights law

		<ul style="list-style-type: none"> ❑ International refugee law ❑ Subsidiary and temporary protection regimes for persons fleeing from or displaced by armed conflicts.
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The above highlights the fact that under international law, all human beings are entitled to the full enjoyment of human rights, including the right to relocate, but it also indicates the differentiation that is made between those who move voluntarily and those displaced with force.

There are various instruments that may or may not have application in certain instances, but there is one potential gap that stands out: ‘those moving across international borders.’

II. THE GAP IN INTERNATIONAL LAW

While most movement will be internal²⁰³ and may well fall within existing migration frameworks, it is evident there is no familiar mould to protect those forced to leave their homes and cross borders where loss of entire territories will occur. Reference is often made to this situation as the ‘gap’ that seems to exist in international law in that there is no hard and fast rule or legislation that can be used to address this issue. On 3 June 2009, the UNGA requested the UN Secretary to submit a report²⁰⁴ on the possible security of implications of climate change. This report highlighted that cross-border displacement causes gaps in international law.²⁰⁵ During the High Commissioner’s Dialogue on Protection Challenges the cross-border displacement as a result of the effects of climate change as well as

²⁰³ McAdam *Swimming Against the Tide* 2011 op cit n 16 at 21.

²⁰⁴ Report of the Secretary op cit n 175. Discussed in Chapter 3. Note that as of 2012 the Security council has not yet addressed climate change in a resolution

²⁰⁵ Kälin & Schrepfer op cit n 4 at 51.

natural disasters, was identified as a ‘normative gap in the international protection regime.’²⁰⁶

National immigration laws restrict the entry of non-citizens into other countries. International law places an obligation on states to protect certain people who have been forcibly displaced – for instance, ‘refugees’ and ‘stateless persons’²⁰⁷ – but, unless people migrate voluntarily for lawful reasons, or fall within one of the forced displacement groups, they are not automatically protected by international law. The mere existence of international human rights law does not mean automatic entitlement to admission and permanent stay in a third country.

The most important distinguishing factor in this instance is the fact that most people have not left their homes yet. If nothing is done they may one day find themselves in a situation knocking at the border gates of foreign countries, seeking protection perhaps even claiming to be refugees.

(a) Applicability of the 1951 Refugee Convention

The possibility of applying the Refugee Convention has been debated and abandoned in various papers.²⁰⁸ A refugee is not someone who is contemplating leaving his or her country of origin at a future date, it is someone who is already outside his or her country of origin. Also, his or her government is unable or not willing to protect such person and he or she as a well-founded fear of persecution that is based on account of his or her:

- race,
- religion,
- nationality,
- political opinion or
- membership of a particular social group.²⁰⁹

²⁰⁶ High Commissioner’s Dialogue on Protection Challenges. Breakout Session 1 (8-9 December 2010). ‘Gaps in the International Protection Framework and in Its Implementation, “Protection Gaps and Responses”’ Report by the Co-Chairs available at <http://www.unhcr.org/4d09e47a9.pdf> accessed on 9 February 2014 at 3.

²⁰⁷ McAdam 2011 Complementary Protection Standards op cit n 7 at 4.

²⁰⁸ See Söderberg, Carl. ‘Human Rights in a Warmer World: The Case of Climate Change Displacement’ (2011) *LUP working paper no. 2011-01-28 Lund University Publications* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749357 accessed on 11 January 2013 for more information on the possible application of the 1951 Convention.

²⁰⁹ Refugee Convention Art 1A(2); McAdam 2009 at op cit n 21 at 12.

Within the current ambit of the Refugee Convention ‘environment’ is not listed as grounds on which a person can base his or her well-founded fear. Another important aspect about the Refugee Convention that is that of the relationship and trust between a national and his or her own government. Within the context of the Refugee Convention, this trust is destroyed by a national’s own government, leaving such a person with a ‘well-founded’ fear that he or she will not receive the necessary protection from his government. Within the context of climate change, one cannot make the assumption that the governments of countries suffering from the impacts of climate change are not able or willing to protect their citizens.²¹⁰

Several attempts have been made by individuals to seek protection within the ambit of the Refugee Convention by claiming to be climate refugees. Recently a Pacific islander from Kiribati argued that he has grounds to be considered as a climate change refugee. Claiming that climate change was slowly destroying his low-lying home, Ioane Teitiota²¹¹ argued that he and his family should not be reported from New Zealand despite the fact that his visa expired. The High Court handed down judgement in which Judge John Priestly acknowledged, ‘Kiribati was suffering environmental degradation attributable to climate change, including storm surges, flooding and contaminated water’ but that Teitiota did not meet the criteria of the Refugee Convention of fearing persecution if they return home and that the attempt to expand the scope of the Refugee Convention is impermissible.²¹² In his decision the judge rejected the argument that Teitiota was ‘persecuted passively’ by the environment, claiming that climate change is a threat and like other governments the Kiribati government was powerless to control it. The judge delivered a stern warning about the future: ‘On a broad level, were they to succeed and be adopted in other jurisdictions, at a stroke, millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships caused by climate change, would be entitled to protection under the Refugee Convention.’ The judge also

²¹⁰ Kālin op cit n 39 at 88.

²¹¹ Teitiota and his wife moved to New Zealand in 2007, where their 3 children were born. The family stayed illegally in the country and for this reason the children are not recognised as citizens since they are the offspring of illegals born in the country acc <http://reliefweb.int/report/kiribati/pacific-islander-fails-bid-be-first-climate-refugee> accessed on 14 December 2013.

²¹² Ioane Teitiota v Chief Executive of the Ministry of Business Innovation and Employment (2013) NZHC 3125 (judgement of 26 November 2013); para 63.

made reference to similar claims²¹³ and stressed that it is ‘not for the High Court of New Zealand to alter the scope of the Refugee Convention in this regard.’

In short, within the context of human movement as a response to the impacts of climate change, and in particular the fact that homes may become uninhabitable, persons or families may chose voluntary migration as an individual adaptation response. However international law does not provide a ‘general entitlement to be admitted to another country’ except under refugee law and the principle of non-refoulement²¹⁴ that prohibits states from sending people back to places where they risk being ‘tortured, exposed to cruel, inhuman or degrading punishment, or subjected to the death penalty or arbitrary deprivation of life.’²¹⁵ Thus, unless a person meets established criteria the 1951 Refugee Convention does not automatically protect him or her.²¹⁶

(b) Relevance of differentiation between voluntary and forced movement

The differentiation between voluntary and forced movement is also important in order to determine which normative framework might be applicable. There are no clear criteria to distinguish between voluntary and forced movements, complicating the situation more. Often the ‘prevailing circumstances’ and the ‘particular vulnerabilities of the people concerned’ are used as points of departure in order to determine whether it would be appropriate to ask of them to return to their original homes.²¹⁷ It is then argued that this ought to be analyzed on the basis of the following elements: ‘permissibility, factual possibility and reasonableness of return.’²¹⁸

Where people move voluntarily because of environmental degradation within existing borders, then existing international human rights law applies. If movement is within existing borders but forced displacement then both international human rights law and the Guiding Principles on Internal

²¹³ People from countries such as Tonga, Fiji and Bangladesh also unsuccessfully made similar claims under international law for climate change refugee status (<http://reliefweb.int/report/kiribati/pacific-islander-fails-bid-be-first-climate-refugee>)

²¹⁴ Kälin op cit n 39 at 95.

²¹⁵ McAdam 2009 op cit n 21 at 18.

²¹⁶ More analysis is necessary to determine if some may be covered by existing regional convention regardless of their formal status. Also see Table 3.

²¹⁷ Kälin op cit n 39 at 95.

²¹⁸ Ibid.

Displacement²¹⁹ apply. This also applies when, as a result of sea level rise, significant permanent losses in state territory arise - as long as the movement is voluntary and within existing borders. In addition, the recently accepted Peninsula Principles on Climate Change Displacement²²⁰ are relevant and applies to those displaced within the borders of their own country as a result of the impacts of climate change. Where armed conflict or violence result over diminishing natural resources then those moving within existing borders are protected by International humanitarian law, international human rights law as well as the Guiding Principles on Internal Displacement. In this instance, those crossing borders as a result of conflict or violence can seek refuge in international humanitarian law, international human rights law, international refugee law and 'subsidiary and temporary protection regimes for persons fleeing from or displaced by armed conflicts.'²²¹

In this instance, there is no factual possibility of return and while it is acknowledged that some might choose to move voluntarily, as a result of a combination of migration drivers, a big part of the population will ultimately be forced to leave their island of origin and move across borders, a situation that may well not have been had it not been for sea-level rise.

(c) Applicability of The Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement is a soft law instrument that provides a framework for addressing displacement that occurs within a country. It is a 'synthesis of international refugee law, humanitarian law and human rights law as applied in the context of internal displacement.'²²² While these principles are relevant to the majority of people displaced as a result of environmental drivers and

²¹⁹ Although the Guiding Principles on Internal Displacement is non-binding soft law they are considered customary international law.

²²⁰ Peninsula Principles op cit n 101.

²²¹ Representative of the Secretary General on the human rights of internally displaced persons 'Displacement caused by the effects of climate change: Who will be affected and what are the gaps in the normative frameworks for their protection?' (10 October 2008) Background paper available at

http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/DisplacementandCC_10102008.pdf accessed on 10 September 2012 at 6.

²²² Kolmannskrog, Vikram. 'Climate change, environmental displacement and international law' (2012) J.Int. Dev 24 1071 at 1072.

impacts of climate change, they do not answer the situation relating to those that will be forced to cross borders as a result of the impact of climate change.

(d) Applicability of The Peninsula Principles on Climate Change Displacement within States

The newly adopted Peninsula Principles are welcomed but they do not address 'climate change displacement' that does not take place within borders. The process behind adopting these new set of principles may well serve as future guidance for a similar framework to address the issue of those forced to cross international borders as a result of sea-level rise.

CHAPTER 5: DEVELOPING AN INTERNATIONAL LEGAL REGIME FOR CLIMATE CHANGE DISPLACED PERSONS

*‘For citizens of sinking island states permanent solutions on the territory of other states must be found.’*²²³ *Walter Kälin*

I. TOWARDS A SOLUTION

It is likely that in the future certain types of human mobility outcomes will be caused by environmental change interacting with other migration drivers. It is also likely that the impact of policies aimed to ‘limit or slow the rate of environmental change on migration may be limited or unpredictable’.²²⁴

Various policy responses have been designed and implemented over the years to assist countries with coping with the impacts of climate change. The Foresight report gives examples of such policies to reduce the need for migration influenced by environmental change relevant to inter alia low-elevation coastal zones,²²⁵ but in some instances even the best-designed policy will not be sufficient to prevent movement. While it has been established that international law principles may be applicable in some instances, they are still fragmented, as are institutional responses. It is indisputable that there will be new flows of displaced persons that need to be managed.²²⁶ It is important to fully understand the mobility outcomes resulting from environmental change, as well as the links between them, in order to make policy decisions.²²⁷

In the process of developing suitable policy options states ought to consider their various obligations that result from their signing of the UNFCCC, and incorporate all possible challenges in their future decision-making.²²⁸ The challenges associated with responding to displacement as a result of the impacts of climate change range from addressing the financial, operational and legal capacities

²²³ op cit n 221.

²²⁴ Foresight Report op cit n 3 at 133, The Foresight Report also highlights and discuss the importance of including the promotion of long-term resilience to environmental change at 142.

²²⁵ Foresight Report op cit n 3 at 135.

²²⁶ McAdam 2011 Oxford op cit n152 at 236.

²²⁷ Foresight Report op cit n 3 at 107, The Foresight Report also provides a figure setting out the six human mobility outcomes arising from environmental change and the links between them at 109, figure 4.1.

²²⁸ Kälin op cit n 39 at 82.

to dealing with this type of human mobility. These challenges ‘exist at three levels’.²²⁹

- a) Addressing the cause: Mitigating climate change
- b) Addressing the effects: Reducing risks created by climate change and vulnerabilities caused by it
- c) Addressing the consequences: Protecting and assisting individuals displaced by the effects of climate change

While options A and B are valid, the only option that is truly left for those living on small islands states is option C.²³⁰ To address the consequences of climate change, and in this instance, to protect and assist those impacted by rising sea-levels.

From the outset of this paper it has been mentioned that migration as a result of environmental change is not a new phenomenon. The same applies to displacement as a result of environmental factors. Floods, hurricanes and typhoons are examples of natural disasters that displace people, either temporarily or permanently. The disaster management legislation of most countries includes provisions pertaining to the necessary assistance and protection for those affected by natural disasters in their home country.²³¹ Based on humanitarian grounds, and not because there is a specific policy or legal instrument in place, certain states have ‘admitted and received’ people displaced across borders in their territories as a ‘temporary measure on a very ad hoc basis.’²³² Also on a domestic level some states have implemented systems of ‘temporary or subsidiary protection for disaster-induced cross border displaced persons’²³³ – providing some temporary relief to this gap. However, it has been shown that there is no permanent solution for those living on small island states, displaced because of sea level rise and ultimately forced to cross borders. Despite the lack of permanent solutions, various

²²⁹ Ibid.

²³⁰ Kälén op cit n 39 at 83 ‘Mitigation and ex ante adaptation measures are often insufficient to prevent individuals from becoming displaced or otherwise being affected by the negative consequences of climate change.’

²³¹ Kälén & Schrepfer op cit n 4 at 45.

²³² Ibid.

²³³ Ibid. The Nansen Conference, Chairperson’s Summary, para 22 makes similar mention of measures taken available at <http://pnc.iucnp.org/wp/wp-content/uploads/2011/06/Chairpersons-Summary-Nansen-Conference-on-Climate-Change-and-Displacement.pdf> accessed on 3 January 2014. Also see general Kälén & Schrepfer op cit n 4 for lists examples of some temporary protection measures.

initiatives have been undertaken to pave the way towards a solution to assist those crossing borders as a result of climate change.

II. SOFT LAW AND THE NANSEN INITIATIVE THAT MAKES SPECIFIC REFERENCE TO SMALL ISLAND STATES, THREATENED BY SEA-LEVEL RISE

On 21 October 1989 the Commonwealth Heads of Government Meeting adopted the Langkawi Declaration on the Environment²³⁴ expressing concern over permanent and irreversible damage as a result of the serious deterioration in the environment. Specific mention is made of islands and low-lying countries that are threatened by sea-level rise.²³⁵ In the Langkawi Declaration, the Heads of Government of the Commonwealth resolved to act collectively and individually and to commit themselves to a programme of action that includes inter alia

‘support [for] low-lying and island countries in their efforts to protect themselves and their vulnerable natural marine ecosystems from the effects of sea level rise’

The Small States Conference on Sea Level Rise was held at Male, Maldives, from 14 to 18 November 1989 where the Male Declaration on Global Warming and Sea Level Rise²³⁶ was adopted. This declaration describes the predicament of low-lying, small, coastal and island States and expressed the fact that their survival was threatened. The declaration states specifically that an ‘effective international strategy for the small States of the World to cope with those impacts should be agreed upon as a separate issue within a global strategy.’

The 2004 Otin Taai Declaration²³⁷ also acknowledges how Pacific island countries will be significantly affected by anthropogenic climate change.²³⁸ On 20 August 2008 the Niue Declaration on Climate Change²³⁹ was adopted, and the ‘climate witnesses’ of the coastal region of Bangladesh expressed their concerns

²³⁴ Langkawi Declaration on the Environment (adopted 21 October 1989) available at <http://thecommonwealth.org/sites/default/files/news-items/documents/Langkawi-declaration.pdf> accessed on 18 January 2014.

²³⁵ Langkawi Declaration on the Environment op cit n 234 para 3.

²³⁶ Male Declaration on the Human Dimension of Global Climate Change (adopted 14 November 2007) available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf accessed on 18 January 2014

²³⁷ See Chapter 1.

²³⁸ McAdam Swimming Against the Tide 2011 op cit n 16 at 7.

²³⁹ Niue Declaration on Climate Change, 39th Pacific Islands Forum, Forum Communiqué, Annex B (adopted 20 August 2009) available at http://www.pacificdisaster.net/m/show_article.jsp?id=9458 accessed on 1 March 2013

over the lives and livelihoods of the coastal people of Bangladesh and how it is being impacted by ‘frequent depression in the sea, storm, cyclone and tidal surges’ making specific recommendations of their views on what ought to be done.²⁴⁰ More recently, the 2011 Nansen Conference on Climate Change led to the Nansen Initiative launched by Norway and Switzerland on 2 October 2012. Addressing the ‘need for a more coherent and consistent approach to the protection of people displaced externally, ie across national borders, including but not limited to people whose movements are triggered by climate change’²⁴¹ this initiative is an important step in the right direction. As an overall goal, it aims to build consensus on principles and elements that are key to the protection of those displaced across borders and to set the agenda for future action at all levels, domestic, regional and international.²⁴²

What the proposals are trying to clarify is the duty of states to assist those affected by the impacts of climate change – in this instance those who are displaced.

III. PROPOSALS MADE FOR A LEGAL REGIME

Chapter 4 has shown that currently there is no legal instrument that deals specifically with the issue of those displaced as a result of climate change, and that international law recognizes only a small class of people as forced migrants, people whom other countries have an obligation to protect. Without a normative framework, some may therefore not have legal protection when they are forced to move. Table 4 lists a selection of the various proposals that have been made so far for a new instrument to address the issue of those displaced by climate change.²⁴³ Most proposals try to address the rights gap and the funding gap.²⁴⁴ For the purpose of this paper, focus is only placed on the rights gap.

²⁴⁰ Shaheed Hadis Park, Bangladesh. Posted on Save the Coastlines on 14 November 2009 available at <http://savethecoastlines.blogspot.com/2010/01/climate-change-vioce-of-victims-from.html> accessed on 2 February 2014.

²⁴¹ Submission to UNFCCC SBI op cit n 78 at 3.

²⁴² Ibid.

²⁴³ This table is compiled mostly from the various proposals listed in McAdam Oxford 2011 op cit n 152 at 190; McAdam 2011 Swimming against the tide op cit n 16 at 4; McAdam 2011 Complementary protection standards op cit n 7 at 55; Hodgkinson op cit n 69 at 6 and McAnaney, Sheila. ‘Formulating a realistic solution to climate change displacement’ (2012) 87 *New York University Law Review* 1172 -1209 at 6.

²⁴⁴ McAnaney op cit n 243 at 6.

Table 4: Summary of proposals made

	Proposal made by	Date	Proposal
1.	Maldives, at state level	2006	Proposed amending the Refugee Convention ²⁴⁵ to extend the definition of a refugee in Article 1 A(2) to include ‘climate refugees’
2.	Sujatha Byravan & Sudhir Chella Rajan	2006	Propose a ‘new global convention to establish special migration status for climate exiles and migrants.’ ²⁴⁶ Protection under this proposal is limited to those ‘living on small islands and along coasts in low-lying countries whose habitats and means of livelihood have been destroyed by climate impacts.’
3.	Environmental Justice Foundation	2009	Proposed the international community to initiate negotiations for a new legally-binding agreement on climate change refugees. This new legal framework (either under the UNFCCC or a stand –

²⁴⁵ Similar proposal was proposed by others *inter alia* Cooper, J.B: Environmental Refugees: Meeting the Requirements of the Refugee Definition – in this work it was proposed that under the Refugee Convention displaced persons were to be granted ‘refugee’ status.

²⁴⁶ See McAnaney op cit n 243 at 6; Byravan, Sujatha., Rajan Sudhir., ‘Providing New Homes for Climate Change Exiles’ 2006, available at http://cdf.ifmr.ac.in/wp-content/uploads/2011/03/CP_6_2_07_Byravan_247-252.pdf accessed on March 2012

			alone convention) must build on existing mechanisms. ²⁴⁷
4.	Scholars: Docherty and Giannini	2009 ‘Confronting a rising tide: A proposal for a Convention on Climate Change Refugees’	Proposed an ‘independent’ or ‘stand-alone’ convention defining the term ‘climate change refugee’ and containing ‘guarantees of assistance, shared responsibility, and administration.’ Also, it is suggested that protected status are granted to people who have to leave their home countries ‘as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.’ ²⁴⁸
5.	Equity and Justice Working Group Bangladesh (EquityBD) A Bangladeshi NGO	April 2009	Called for a new protocol to the UNFCCC to ensure social, cultural and economic rehabilitation of the ‘climate refugees’ through recognizing them as ‘Universal Natural Persons’ ²⁴⁹

²⁴⁷ Environmental Justice Foundation ‘No Place Like Home - Where Next For Climate Refugees’ 2009, Available at <http://ejfoundation.org/sites/default/files/public/no%20place%20like%20home.pdf> accessed on 19 November 2013.

²⁴⁸ Docherty, Bonnie., Giannini, Tyler ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ 2009, available at http://www.law.harvard.edu/students/orgs/elr/vol33_2/Docherty%20Giannini.pdf accessed on 4 December 2013 at 361.

²⁴⁹ Shamsuddoha, M.; Chowdhury, R.K ‘Climate change induced forced migrants: in need of dignified recognition under a new Protocol’ 2009 available at <http://www.glogov.org/images/doc/equitybd.pdf> accessed on 1 February 2014

6.	Bangladeshi Finance Minister	December 2009	‘The convention on refugees could be revised to protect people. It has been through other revisions, so this could be possible.’
7.	Scholars: Biermann and Boas	February 2010	UNFCCC Protocol on the Recognition, Protection, and Resettlement of Climate Refugees ²⁵⁰
8.	Group of scholars from the University of Limoges	May 2010	Published a Draft Convention on the International Status of Environmentally –Displaced Persons ²⁵¹
9.	Bangladeshi Prime Minister, Sheikh Hasina	September 2010	Proposed a joint South Asian initiative to mobilize international support under the UNFCCC to ensure the social, cultural, and economic rehabilitation of climate change-induced displaced people
		April 2011	Calling for ‘the establishment of an international regime under the UN to tackle the situation.’

²⁵⁰ Biermann, Frank., Boas, Ingrid., ‘Preparing for a warmer world: Towards a Global Governance System to Protect Climate Refugees’ (2010) *Global Environmental Politics, Volume 10, Number 1*. 60-88 Also available at:

<http://www.acpmigration-obs.org/sites/default/files/Biermann%20-%20Preparing%20for%20a%20warmer%20world.pdf>

²⁵¹ Draft Convention on the International status of environmentally – displaced persons, second version (May 2010) Available at [http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20\(second%20version\).pdf](http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20(second%20version).pdf) accessed on 4 January 2014.

10.	Scholars: Byravan and Chella Rajan		Raised the prospect of a treaty creating ‘climate exile’ status, giving people in ‘physically unviable’ States the ‘right to migrate to a particular or previously agreed upon country’.
11.	Australian based project: A Convention for Climate Change Displaced Persons.		Seeks to elaborate ‘a draft convention for persons displaced by climate change’, which would establish an international regime for the status and treatment of such persons.
12.	Council of Europe Parliamentary Assembly’s Committee on Migration, Refugees and Population		Suggested ‘adding an additional protocol to the European Convention on Human Rights, concerning the right to a healthy and safe environment as a way of enhancing the human rights protection mechanisms vis-à-vis the challenges of climate change and environmental degradation processes.’
13.	Austrian –based study (Margit Ammer and others)		Focusing on the ‘development of a comprehensive international treaty with a strong focus on responsibility-sharing mechanisms, as well as a guaranteed legal status for the displaced’.

McAdam points out the underlying basis of these proposals: '[P]resumably, to provide a rights-based framework for people to move when the impacts of climate change render life and livelihoods at home impossible.'²⁵² She also points out that they differ in defining those displaced and in determining status: Would protection be provided based on 'individual status determination' or would it be granted *prima facie* based on the conditions of the country from where people are displaced? Hodgkinson and Young also point out that most proposals agree that the scope of the existing refugee regime under the 1951 Refugee Convention does not cover those displaced as a result of the impacts of climate change.²⁵³ This is where the conversation moves to the idea of a convention as a possible solution.

(a) Arguments made supporting a convention

Advocates of a stand-alone convention are of the opinion that a new convention, addressing displacement as a result of the impacts of climate change, will compliment existing international law. In particular it will compliment refugee law that has proven to provide inadequate assistance and protection to those displaced as a result of the impacts of climate change.²⁵⁴ The fact that the issue of displacement is not included in either the UNFCCC process or its Kyoto Protocol is also raised as an argument as to why a new legal instrument is necessary to address the limitations of these existing frameworks.²⁵⁵ It is also argued that the issue of displacement as a result of the impact of climate change is 'sufficiently new and substantial' to justify its own legal regime and that it should not be 'forced within legal frameworks that were not designed to handle it'.²⁵⁶ It is further argued that no 'coherent multilateral governance framework'²⁵⁷ exists and that an independent convention can be 'creatively tailored to the complexity of the problem and to take a broad based and integrated approach' and that negotiations for such a new convention 'could break out of the traditional state-to-state mould and involve communities and civil society.'²⁵⁸ The lack of comprehensive proposals to address

²⁵² McAdam 2011 Oxford op cit n 152 at 192.

²⁵³ Hodgkinson op cit n 15 at 6; Note that there are exceptional circumstances where the Refugee Convention may apply.

²⁵⁴ Docherty & Giannini 248 at 2.

²⁵⁵ Hodgkinson op cit n 15.

²⁵⁶ Docherty & Giannini op cit n 248 at 350.

²⁵⁷ Hodgkinson op cit n 15 at 7; Similar argument in Docherty & Giannini op cit n 248 at 7.

²⁵⁸ Docherty & Giannini op cit n 248 at 2.

the problem of those displaced as a result of climate change is also raised as part of an argument to strengthen the case for a convention.²⁵⁹ Those proposing a convention also often refer to the scale and nature of the problem to add weight to their argument.²⁶⁰

(b) Why a convention is not the best solution

When existing international law do not provide normative answers to a specific issue then a new legal instrument, negotiated by the international community, can fill the void.²⁶¹ However, adopting negotiating text is a long process that requires considerable compromise.²⁶² The issues under negotiation as part of the UNFCCC process are known for their complexity, and the entire process serves as an illustration of the amount of time needed and political battlefield nature of working towards such a compromise. This process is further prolonged because, often, linguistic detail slows down the climate change discussion rather than substance.²⁶³ It has been illustrated that movement and/or displacement as a result of the impacts of climate change is a result of a combination of drivers with ‘spatially and socially differentiated’²⁶⁴ impacts on human movement. To successfully negotiate an instrument of compromise caution needs to be paid to stay clear from an instrument that may be generally ‘too vague, and which cannot be translated into practical, rational policies and normative frameworks’.²⁶⁵ For this reason it is argued that guiding principles may be a more appropriate solution.²⁶⁶

The various forms of movement and the accompanying complexity has also been discussed as well as the need to often place legal questions into specific boxes. Mc Adam heeds caution ‘against squeezing all forms of ‘forced’ movement into a protection paradigm – responses would be better achieved by focusing on states’ burden – sharing obligations to each other, and their responsibility to the international community as a whole.’²⁶⁷

²⁵⁹ Hodgkinson op cit n 15 at 6.

²⁶⁰ Hodgkinson op cit n 15 at 2.

²⁶¹ Kälén & Schrepfer op cit n 4 at 69- 70.

²⁶² McAdam Swimming Against the Tide 2011 op cit n 16 at 4.

²⁶³ McAdam Swimming Against the Tide 2011 op cit n 16 at 4 & 10.

²⁶⁴ McAdam Swimming Against the Tide 2011 op cit n 16 at 10.

²⁶⁵ McAdam Swimming Against the Tide 2011 op cit n 16 at 21.

²⁶⁶ McAdam Swimming Against the Tide 2011 op cit n 16 at 10.

²⁶⁷ McAdam Swimming Against the Tide 2011 op cit n 16 at 22.

I agree that a treaty should be viewed as ‘one of a number of mechanisms that may respond to climate-induced displacement, rather than as the solution.’²⁶⁸ Another important argument is that most movement will be internal and that the Guiding Principles and the new Peninsula Principles will apply in these instances. Yet, the particular type of movement caused by sea-level rise is not covered by these sets of principles.

While it seems almost impossible to negotiate an international response that will provide and account for all the different types of movement and interests of various States, the answer might lie in the development of regional soft-law to act as a guiding framework. The Niue-Declaration on Climate Change for instance will provide a ‘more effective springboard for developing responses, than will a new international instrument aiming to take into account the interests of all states in a wide variety of contexts’.²⁶⁹ Clear frameworks also already exist at the normative level, the most relevant and important being the human rights law regime that can further guide actions.²⁷⁰ While the UNFCCC was drafted with the aim to mitigate climate change, it does not mean that the surrounding process did not develop in a manner to include different elements. Over the years, various work programs and bodies were established to address emerging issues coupled with climate change, broadening the response of the UNFCCC beyond mitigation and adaptation.

III. THE ROLE OF THE UNFCCC

At the time of the initial negotiations of the UNFCCC it was hoped that mitigation would be the answer to the world’s changing climate problem. Adaptation as a response measure only started flourishing much later at the 13th Conference of the Parties (COP 13) held in Bali, Indonesia 2007. Even more so migration as an ultimate adaptation response to climate change was most certainly not discussed at the first COP, in fact it was only much later that migration and displacement made their way into the UNFCCC process.²⁷¹

²⁶⁸ McAdam *Swimming Against the Tide* 2011 op cit n 16 at 6.

²⁶⁹ McAdam *Swimming Against the Tide* 2011 op cit n 16 at 22.

²⁷⁰ *Ibid.*

²⁷¹ Warner, Koko ‘Migration and Displacement in the Context of Adaptation to Climate Change: Development in the UNFCCC Climate Negotiations and Potential for Future Action’ 2011 available at <http://www.unhcr.org/4df9cc309.pdf> accessed on 10 January 2014 at 7.

Adopted at COP 13, the Bali Road Map included the Bali Action Plan²⁷² laying out the elements of adaptation to be considered in future agreements.²⁷³ Migration was mentioned for the first time in the assembly document that was compiled from submissions received from COP 13 to 30 September 2008.²⁷⁴ One of the many submissions that was included in the initial assembly text but that did not make its way to the negotiating text was a proposal made by the Alliance of Small Island States (AOSIS) for an international climate insurance facility, and the proposal made reference to ‘longer-term processes that might include population displacement’ if rigorous mitigation measures were not taken.²⁷⁵ During the second session of the Ad Hoc Working Group on Long –term Cooperative Action (AWG – LCA), Bangladesh presented a submission²⁷⁶ on behalf of the Least Developed Countries (LDCs) raising the issue of ‘compensation for climate victims/climate refugees’ suggestion a ‘mechanism for assessing loss and damage’ and ‘a financial mechanism towards addressing immediate owes of climate victims.’²⁷⁷ These suggestions may not have made their way into the draft negotiating text for COP 14, 2008, but migration remained seen in the text. Academic literature also saw an increase of interest in the topic. At the open plenary of the June 2009 Subsidiary Body meetings held in Bonn, Germany the head of the US delegation, Jonathan Pershing rightfully raised concern about the term ‘climate refugee’ being used in the draft text.²⁷⁸ Pershing’s recommendation was noted by the UNFCCC, and the wording around migration and displacement was revised and continued to find its way into the discussions from Bangkok and Barcelona 2009 to later that same year at COP 15 held in Copenhagen December 2009. Other than Pershing’s concern about the term used to address the issue, there is no public record of objections or concerns raised by Parties to the Convention about the inclusion of the issue in the

²⁷² FCCC/CP/2007/6/Add.1 (Decision 1/CP.13). available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3> accessed on 1 February 2014.

²⁷³ Warner op cit n 271 at 7.

²⁷⁴ Warner op cit n 271 at 8.

²⁷⁵ Ibid.

²⁷⁶ Presentation made by Bangladesh at Ad Hoc Working Group session on adaptation available at

http://unfccc.int/files/adaptation/application/pdf/bangladesh_awgcla2_adaptation_workshop.pdf accessed on 22 December 2013.

²⁷⁷ Bangladesh op cit n 276 at 5.

²⁷⁸ Warner op cit n 271 at 8.

UNFCCC negotiations text²⁷⁹, and as the world held its breath towards the COP 15 negotiations, AWG – LCA delegates continued to work on elements of an adaptation framework that was broader and which included ‘migration and displacement.’²⁸⁰ Some member States suggested that a range of themes, including human rights, compensation to vulnerable people, climate justice etc are added to the paragraph on migration and displacement. There was a general concern that such inclusions would place a heavy burden on the paragraph, and by means of compromise most of these issues were placed as principles in the preambular text.²⁸¹ The discussion resulted in the COP 15 outcome text²⁸² to read:

‘4. Invites all Parties to enhance adaptation action under the Copenhagen Adaptation Framework [for Implementation]²⁸³ taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstance, [and whereby developing country Parties shall be supported by developed country Parties and in accordance with paragraph 6 below], to undertake, inter alia:

....

(f) Measures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate.’

This was the first time that the issue of migration and displacement made its way into the draft UNFCCC negotiation text, 2010, 18 years after the signing of the Convention. The subparagraph on migration and displacement was put in the context of the list of activities in paragraph 4 that could be seen as ‘adaptation’ and laid the basis to define an adaptation framework that was broad enough and that could guide future work. Another important aspect of paragraph 4 is that it created a list of activities that ‘might qualify either for adaptation – related funding or that donors might interpret as ‘countable’ towards their commitments to help finance adaptation to climate change.’²⁸⁴ An important hypothesis is made by Warner, one that only ‘time will tell’ but he raises the point that because of the inclusion of this issue in the draft Copenhagen negotiating text it is ‘expected that governments and

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² FCCC/CP/2010/2 available at <http://unfccc.int/resource/docs/2010/cop16/eng/02.pdf>

²⁸³ The bracketed text was resisted.

²⁸⁴ Warner op cit n 271 at 9.

other organisations could be more favourable to supporting activities for better understanding human mobility in the context of climate change.²⁸⁵ Warner also highlights the commitment made by industrialised countries to provide fast start finance of up to 30 billion USD by 2012 and 100 billion or more per year by 2020 and concludes that an ‘inclusion of a subparagraph in this context signalled to donors that investment was needed around the knowledge base and exchange views on migration and displacement.’²⁸⁶

From Copenhagen to Cancun the issue of migration and displacement was ‘securely inside the ‘package’ of text where few brackets existed.’ Unchanged the text remained after Copenhagen²⁸⁷ until October 2010 when the adaptation text was briefly opened for discussion in Tianjin.²⁸⁸ The Cancun negotiations felt the pressure of the failed Copenhagen negotiations and pressure was mounting to create outcomes that would deliver concrete results, an outcome that was not too ambitious and that would restore faith in the UNFCCC process that was questioned. In light of this delegates focused on the elements to include in a possible Cancun Adaptation Framework. As their work progressed the migration text changed.

The wording slightly changed by the Tianjin chair and to read:

(f) Measure to enhance understanding, coordination and cooperation with *regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels*²⁸⁹

These changes clarified the previous text in order not to give room for interpretation that there are ‘separate divisions or categories according to national, regional and international environmentally induced migrants.’²⁹⁰ The importance of the new wording lies in the fact that it makes decision makers aware of the different forms of migration and displacement and that it necessitates different policy approaches.²⁹¹ Another important indication that the likelihood of a one-size fits all instrument is slim.

²⁸⁵ Warner op cit n 271 at 9.

²⁸⁶ Ibid.

²⁸⁷ Warner op cit n 271 at 10 & 11. The paragraph on adaptation did not change much between Copenhagen and Cancun mostly because the adaptation text was not open for discussion and or redrafting, as part of the strategy of Margaret Mukahanana – Sangarwe, the AWG-LCA chair.

²⁸⁸ Warner op cit n 271 at 10.

²⁸⁹ Warner op cit n 271 at 11.

²⁹⁰ Ibid.

²⁹¹ Ibid.

The new wording also clearly sets out that coordination and cooperation that relates to migration and displacement could occur at all levels, national, regional and international.²⁹²

Since making its first appearance in the UNFCCC draft negotiation text, the topic was referred to in several different ways.

Table 5: Reference of migration and displacement in the UNFCCC process, field observations and high level meetings²⁹³

Date	Document/ Conference	Relevance
1970 & 1980		References to environmental change and migration appeared in some literature
1990's		More regular mentioning ²⁹⁴
1990	IPCC First assessment report	Mentions environmentally induced migration
2006 & 2007	IPCC Fourth assessment report Stern review and other key literature	Migration and displacement mentioned in the report -other reports in the mid – to late 2000s ²⁹⁵
2007	COP 13 - Bali	Through the activities of the

²⁹² Ibid.

²⁹³ Table compiled from information from Warner op cit n 271 at 11,12 & 21.

²⁹⁴ Reference to Lonergan, 1998; Homer-Dixon, 1999 in Warner op cit n 271 at 20-

²⁹⁵ Massey, 2007; Kniveton et al., 2008; Jäger et al., 2009; Warner et al., (more articles listed at Warner op cit n 271 at 20)

²⁹⁶ The Heads of Organizations of the Inter-Agency Standing Committee (IASC) is an inter-agency forum for human coordination and was established in June 1992 following a UN General Assembly Resolution (UN General Assembly Resolution 46/182) on the strengthening of humanitarian assistance. It involves key UN and non-UN humanitarian actors and is a policy development and decision making forum for its members. Wider participation was also coordinated by the IASC informal group on climate change and displacement and by various other UN and international and civil society organisations, including the Climate Action Network (CAN), that are concerned with migration and displacement. From 2008 onwards a constant flow of information on the topic was provided by these groups that coordinated side events, policy briefings, bilateral meetings with Parties and joint publications. On 30 April 2009 IASC submitted a letter, the first to be signed by all organizational heads of the IASC, to the Yvo de Boer, the then Executive Secretary of the UNFCCC. This letter expressed the desire to draw the attention of the UNFCCC parties to the human implications of climate change and calling for these implications to be acknowledge and

		IASC ²⁹⁶ , the humanitarian community played a particular role
2007 onwards	Field observations Each – for project ²⁹⁷ And other projects ²⁹⁸ *in aug 2008 and at the Accra, Ghana session of the AWG -LCA the each – for and related research findings were first reported in a submission to the UNFCCC	Each-for: research findings based on filed work in 23 case studies worldwide ²⁹⁹
December 2008 Poznan, Poland	Assembly text	Referred to ‘migration and displacement’
2009 onwards	New developments E.g uk foresight project Various workshops ³⁰⁰ and international conferences Including several workshops on migration and displacement Approval of new field research projects funded by governments and	Helped to carry the message that migration and displacement were important topics for adaptation

addressed in the successor of the Kyoto Protocol. In the letter the agencies reiterated that they are already actively responding to the consequences of climate change and it was the first of its kind, being signed by all organizational heads of the IASC.

This networks also managed to establish regular communication with the UNFCCC secretariat
²⁹⁷ EACH-FOR op cit n 27.

²⁹⁸ For a list of other research projects see Koko Warner p 20 footnote 12.

²⁹⁹ Warner notes that ‘research that delivered region – specific case studies and related analysis allowed decision makers to see the relevance of the issue of their own country, further underscoring the relevance of including migration and displacement in the draft negotiating text. The research spiked interest, and then provided a basis of evidence to sustained that interest after COP 14 when the issue had already been included in the assembly text.’ See Warner op cit n 272 at 20.

	foundations	
June 2009	AWG - LCA draft text	Used term ‘climate refugees’ – objection was made by one party regarding this terminology
December 2009	Outcome text of COP 15 (fccc/cp/2010/2) Paragraph 4(f)	‘climate change induced displacement, migration and planned relocation’ Reflected the understanding that ‘human mobility occurs on an adaptation continuum, and placed the issue within a larger adaptation framework.’ ³⁰¹
October 2010	Paragraph 4(f)	Text slightly changed and articulated Different kinds of measures (research, coordination, cooperation) Different types of mobility (displacement, migration, planned relocation) Different levels of mobility (national, regional, international)
December 2010	COP 16 Draft text accepted by	Reflecting a more nuanced way

³⁰⁰ The author attended the following international proceedings: Climate Change and Forced Migration side event – Bonn, UNFCCC meeting June 2009; Walter Kälin (SRSG) Opening address at Population Movement in context of climate change side event at 12th session of the Human Rights Council 16 – September 2009; Presentation of draft Convention on environmentally displaced persons by Dr Jean – Pierre Marquénaud; 7th Gathering for Human Rights – Geneva 28 September 2009 and Environmental Change and its impact on Human Societies – 9 Oct 2009.

³⁰¹ Warner op cit n 271 at 12.

	parties, Paragraph 4 (f) of the Cancun adaptation agreement	
2013	High – level panel on climate change and migration at the global forum on migration and development	
2014	IPCC Fifth assessment report Working Group II	Chapter 12 and regional chapters – particular mention of migration and displacement

No provisions concerning specific assistance or protection for persons who will be directly affected by the impacts of climate change are included in either the UNFCCC or the Kyoto Protocol³⁰² and addressing the issues of displacement is not contemplated in these instruments.³⁰³ While the topic receives a lot of attention in academic literature and surrounding issues such as definitions dominated academic discussion, paragraph 4(f) made its way into the Cancun Adaptation Framework with little resistance and no controversy. Receiving less political attention and being described as technical in nature³⁰⁴

However, the inclusion of paragraph 14(f) in the Cancun is a ‘modest but significant milestone in addressing climate change-related human mobility’.³⁰⁵ Human movement is now referenced within the wider context of enhancing national action on adaptation, but an obligation on how to turn ‘enhanced “understanding, coordination and cooperation” into international strategies’ remains elusive.³⁰⁶

³⁰² ISAC Oct 2008 Working Paper op cit n 201 at 1.

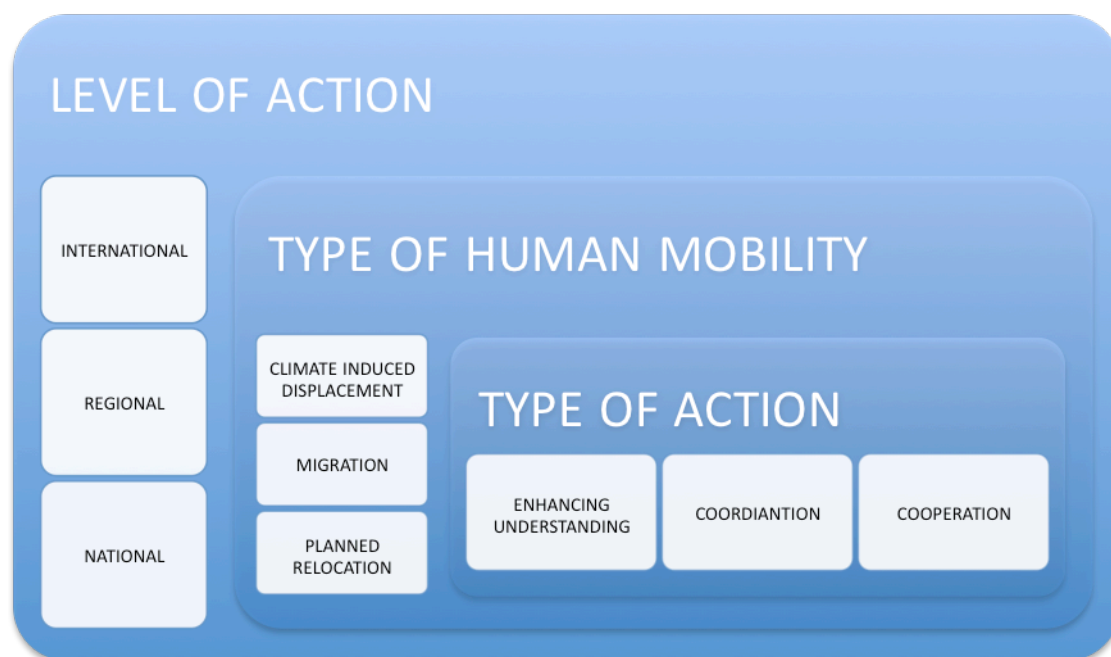
³⁰³ Hodgkinson op cit n 15 at 5.

³⁰⁴ Warner op cit n 271 at 17.

³⁰⁵ Warner op cit n 271 at 28.

³⁰⁶ McAdam Swimming Against the Tide 2011 op cit n 16 at 16.

Figure 2:³⁰⁷ A depiction of paragraph 14(f)



Within the context of small island states being threatened by sea-level rise, ‘planned relocation’ is the ultimate form of adaptation. This type of human mobility falls within the context of paragraph 14(f). The next important steps are to determine the type of action needed, as well as the level at which this type of human mobility needs to be addressed. In addition to determine the type and level of action needed, it is important to identify the most suitable body to undertake this work.

(a) Opportunities within the SBI Work Program on Loss & Damage

At COP 16 and with the creation of the Cancun Adaptation Framework the UNFCCC’s SBI created a Work Program on Loss and Damage with three thematic areas.³⁰⁸ This work program is established to ‘consider, including through workshops and expert meetings, as appropriate to address loss and damage

³⁰⁷ Reproduced from Warner op cit n 10.

³⁰⁸ Thematic area 1: Assessing the risk of loss and damage associated with the adverse effects of climate change and current knowledge on the same. Thematic area 2: A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, taking into consideration experiences at all levels. Thematic area 3: The role of the Convention in enhancing implementation of approaches to address loss and damage associated with the adverse effects of climate change.

associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.’³⁰⁹

It is envisaged that the work programme is an ongoing process of supporting implementation activities, in developing countries that are particularly vulnerable to the adverse effects of climate change, related to loss and damage associated with climate change impacts. The Cancun Adaptation Frameworks sets out the following three Work Program goals:

- Advance understanding of and the reduction of loss and damage;
- Promote the prevention and minimisation of loss and damage;
- Provide a framework for activities that lead to the implementation of measures.

These three goals also translate into the three thematic areas of the Work Programme:

- Thematic area 1: Assessing the risk of loss and damage associated with the adverse effects of climate change and current knowledge on the same.
- Thematic area 2: A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, taking into consideration experiences at all levels.
- Thematic area 3: The role of the Convention in enhancing implementation of approaches to address loss and damage associated with the adverse effects of climate change.

In light of the arguments made that there is a clear gap in international law, that despite various initiatives there is no international body specifically mandated to address this issue and that a separate convention may not be the most appropriate answer – this paper argues that there is room within the SBI Work Program on Loss and Damage to facilitate and address the issue.

There is a strong argument that losing the ability to live within the borders of one’s country, as a result of sea-level rise – one of the distinct impacts of climate change, is a ‘loss and damage’ associated with the impacts of climate change. The

³⁰⁹ Kreft, Sönke. ‘Addressing climate loss and damage, Agreeing on a work programme for action’ 2013 available at <http://www.lossanddamage.net/download/7011.pdf> accessed on 20 December 2013 at 3.

loss of territory is not the only ‘loss’ suffered. There is also the loss of living in close proximity to the land that you are connected to, the possible loss of specific traditions linked to your home island, the loss of certain food types, the inherent damage to family and society structures, to name only a few. It is clear that further ways of understanding this particular loss and damage is needed, as well as ways to reduce it, if possible in any manner. It is here where the inclusion of Article 14(f) creates an opportunity to ‘foster funding and initiatives’ to address the gaps by means of further research about one of the most pertinent migration drivers, environmental change and its impact on migration and displacement.³¹⁰ Further and concluding work needs to be done in terms of agreeing on a definition of human movement that is linked to environmental change as a driver, the drivers in origin areas need to characterize (Warner lists examples: livelihood insecurity, environmental hazards, conflict, demographic pressures, gender inequality, etc.)³¹¹ Therefore calling for more evidence based research. It has been discussed that various drivers influence the decision to move, and a better understanding is needed of the combination of factors. Within the context of sea-level rise initiatives are needed to further foster consultations with those most vulnerable to this particular climate change impact, namely affected communities. In its joint submission to the SBI³¹² the notion of the UNFCCC playing a role in filling the gaps is supported. It supports the idea that the Convention has a role to play in the ‘assessment of actual and potential human mobility linked to climatic stressors, with a loss and damage dimension. Various ways are suggested how the UNFCCC can assess loss and damage.’³¹³

- ‘The Convention, as well as Parties in their own national and regional contexts, can help fill the knowledge and evidence gaps by requesting targeted research and by collecting views and experiences that have not yet been made available (e.g., how pastoral communities have used migration to increase adaptive capacity). Requesting further evidence would also create a potential synergy between two related convention bodies (the SBI and Subsidiary Body for Scientific and Technological Advice ‘SBSTA’) and

³¹⁰ Warner op cit n 271 at 26.

³¹¹ Warner op cit n 271 at 27.

³¹² Oct 2012 Joint submission op cit n 78.

³¹³ Oct 2012 Joint submission op cit 78 at 5.

between the work programme on loss and damage and the Nairobi work programme—and to incorporate this knowledge, as appropriate, into Parties' respective National adaptation planning processes (NAPs).

- 'Enhancing data collection, including establishment of foundational requirements, assessment tools and processes to collect data on loss and damage from the adverse effects of climate change related to human mobility at the appropriate level, in a manner that is also sensitive to vulnerable groups and people and the mandates of organizations who strive to assist and protect these people.
- 'Acting as a repository for expertise and good practice and specific approaches to address loss and damage associated with the adverse effects of climate change relevant to population movements.'
- 'Enhancing the ability of countries to conduct needs assessment and baseline assessments related to human mobility, in order to be able to analyse and make informed decisions on various risk management policies, including enhancing understanding and coordinating assessment methods for slow-onset changes at national and regional levels, including through regional cooperation and regional activities.
- 'The process under the Convention and the work in this field could also serve to enhance understanding of processes to monitor and warn about potential triggering of identified tipping points. The Convention should consider establishing early warning and threshold-monitoring systems relevant to human mobility, and ensure that end users have timely access to relevant information (such as that related to drought and livelihood security).'

In line with the second goal of promoting the prevention and minimisation of loss and damage lies the urgent need for a range of measures and response to address the loss and damage that can be caused by slow-onset impacts such as sea-level rise. In its joint submission the following approaches to address some of the important gaps related to the management of human mobility and loss and damage:

- 'Enhancing coordination and cooperation to strengthen social safety networks and resilience building efforts as part of national and subnational responses to loss and damage from the adverse effects of climate change, including through support under the Green Climate Fund (GCF).

- ‘Giving appropriate consideration to the needs of people who have moved (through migration, displacement and planned relocation) and those who have remained in areas of origin, including those unable to move. Many people will be forced to move from affected areas and adequate provisions will need to be designed in collaboration with relevant international institutions and other stakeholders to consider how to address the issue of migration, displacement and planned relocation. The COP has the capacity to make recommendations to other international bodies along these lines and accordingly to help coordinate their efforts. The Nansen Initiative and other relevant United Nations and other international organizations will engage with the COP in order to share policy-relevant findings and recommendations for its consideration.
- ‘Addressing residual loss and damage from the adverse effects of climate change, including through specific tools, capacity and finance for assessing and addressing risks and impacts from sudden and slow onset changes, including the human mobility dimension. This could involve establishment of a special window

Finally, the submission suggests that the COP should coordinate policy and ensure coherence in policy and action on loss and damage in relation to Paragraph 14(f) of the Cancun Adaption Framework. It suggests that the COP consider an ‘international series of regional platforms to coordinate policy and actions to address human mobility, including systematic efforts to support responses to slow-onset climatic stressors which may contribute to migration, displacement and/or the need for planned relocation of populations to safer or more habitable locations.’ It also suggests that:

- ‘The Convention should link with appropriate UN and other international organizations working on human mobility and displacement issues, and link with other UN conventions such as the Convention on Biodiversity and the Convention to Combat Desertification, as appropriate.
- ‘The Convention should also be used to promote policy coherence and relevant regulations in a manner that improves conditions for developing countries in line with country-driven national and regional approaches.

- The Adaptation Committee provides recommendations to Parties (the COP) on adaptation. It therefore could (in combination with Least Developed Country Expert Group (LEG)) collect good practice and lessons learned regarding human mobility in the context of climate change, but also relevant lessons from other areas such as development-related relocation, internal displacement. The Adaptation Committee also has a mandate to liaise with processes outside the Convention to increase the profile of adaptation and policy coherence. Activities such as liaising with the Nansen Initiative may also be appropriate.³¹⁴

Raising and addressing the issue of this particular type of human movement, brought on by sea-level rise, within the Work Programme on Loss and Damage may well be the most pragmatic manner to ensure that the distinctive features of specific small island states are considered and taken into consideration. Under the umbrella of the existing climate change regime and its framework convention, this programme serves as a platform from where the creation and coordination of country-specific policy measures can take place, while giving due regard to the work undertaken by the international community thus far.

³¹⁴ Oct 2012 Joint submission op cit 78 at 7.

CONCLUSION

It has been illustrated that it is not climate change per se that inflicts harm, but the impacts thereof. One particular impact, sea-level rise, threatens the existence of small island states, forcing its inhabitants to cross international borders. The discussion has indicated that existing legal frameworks fall short of suitable protection for this particular group of people – the populations of small island states.

While some had hoped that a Refugee Convention would provide refuge, this hope is fading. The Statelessness Convention can be relied upon once the nationality of an individual is no longer recognized. It is highly unlikely that states would not recognize the nationality of those affected by the impacts of climate change, creating a strong presumption of the continuation of statehood.

In certain instances, existing international migration mechanisms can provide a favourable solution to climate change-related migration.³¹⁵ Voluntary migration of individuals from small island states to other countries could be absorbed by current mechanisms.³¹⁶ Currently, migration policies are in place in Tuvalu³¹⁷ and migration schemes to New Zealand is possible under two migration schemes.³¹⁸ Despite the wish of the inhabitants to remain in their home countries, there is a significant possibility that a time will come when they will have to relocate to another country.

³¹⁵ See Hugo op cit n 34 at 33. In his work Hugo sets out the advantages of the route of existing international migration mechanisms.

³¹⁶ In 2009 Jane McAdam interviewed Sir Kamuta Latasi, the Speaker of the Tuvaluan Parliament (and former Prime Minister) who noted that: 'The only country who helped us at the time was the Prime Minister of Niue who offered for some [Tuvaluan] families to travel to Niue and settle and work there... And about 8 or 10 families, they are all in Niue now. Some of them are citizens of New Zealand because Niue is under New Zealand and they have been very, very happy. But that's changed...it's out. They are trying to revive it now. So you see – the only country who responded to that need was a pacific brother - Niue like us.' As quoted in McAdam 2011 Oxford op cit n152 pat 145

³¹⁷ Gemene op cit n 80 at 336.

³¹⁸ Gemene op cit n 80 at 338. The one migration scheme, the Pacific Access Category is often 'confused with and misnamed as an environmental migration agreement.' This scheme allows an annual quota of 650 citizens from Fiji, Tuvalu, Kiribati and Tonga to settle in New Zealand. Stringent conditions, including a good command in English, a job offer etc are to be met before the migration process can commence. See Hugo op cit n 34 Hugo for Existing New Zealand migration categories which could accommodate climate – forced migrants from the Pacific (Hugo op cit n 34 Table 7 at 334) as well as Australia's Temporary Safe Haven Visa Class (UJ) at Table 8.

The clear gap in international law makes it tempting to advocate for a new convention to address the issue of those displaced by the impacts of climate change. Yet the arguments for a convention are weak, and there is a ‘low appetite’ for a new legal instrument.³¹⁹ Given the complex nature of the problem, the various drivers, voluntary versus forced movement, movement within borders, movement across borders, it is almost impossible to negotiate a convention that is ‘comprehensive’ and ‘global’.

The newly adopted Peninsula Principles provide an overarching framework that can manage, when necessary, the new flow of displaced persons within borders.

The Cancun Adaptation Framework, and in particular Art 14(f), is the first international attempt to create a space where a range of issues including human mobility is recognised and linked to the emerging climate finance regime.³²⁰

In addition, the Cancun Adaptation Framework mandated the SBI to gather recommendations on loss and damage, and to strengthen international cooperation and expertise in developing an understanding of the loss and damage associated with the impacts of climate change, including slow-onset events such as sea-level rise.³²¹ Submissions by stakeholders reflect strong arguments that the UNFCCC, particularly the SBI Work Program on Loss and Damage, has a pertinent role to play in facilitating the process of human mobility within the context of climate change.

In instances where relocation will be necessary, the needs, lack of understanding, gaps, and challenges fall well within the thematic areas of the SBI work program on Loss and Damage. This leaves room for coordination of policy on the loss and damage suffered by the inhabitants of small island states, and planned relocation as a paragraph 14(f) type of human mobility that requires enhanced understanding and coordination, but most of all, requires cooperation.

³¹⁹ Warner op cit n 10 at 28.

³²⁰ Ibid.

³²¹ Cancun Adaptation Framework, ‘Draft Decision -/CP.16: Outcome of the Work of the Ad Hoc Working Group on Long- Term Cooperative Action under the Convention’
FCCC/CP/2010/7/Add.1. (adopted December 2010)

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